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127 Wash. App. 478

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

ALAN DeATLEY and DEBRA DeATLEY, husband and wife,	
Appellants,	**No. 22780-4-III cons.w/ No. 22977-7-III**
v.	**Division Three**
LYNN BARNETT, MARLENE BARNETT, and LOOKOUT POINT PARTNERS,	**Panel One**
	PUBLISHED OPINION
	(Filed May 17, 2005)
Respondents.	

BROWN, J. – This is a contract dispute to enforce a first right of refusal brought by Alan and Debra DeAtley against developers Lynn and Marlene Barnett and the Barnetts' partnership, Lookout Point Partners (the Barnetts unless otherwise indicated). The Barnetts traded land and the first right of refusal for road work to be done by the DeAtleys. After the Barnetts discovered an intervening DeAtley bankruptcy, the trial court granted summary dismissal of the complaint on the Barnetts' theory that the DeAtleys' bankruptcy discharged the Barnetts' first right of refusal obligations. The judge awarded the Barnetts attorney fees under the contract relating solely to the dismissal motion. The bankruptcy and judicial estoppel vitiate the DeAtleys' claim. We affirm and grant the Barnetts and Lookout Point their attorney fees here.

FACTS

In January 1986, the Barnetts purchased around 500 acres of undeveloped land in Yakima County by real estate contract. In February 1986, the Barnetts entered into the Lookout Point partnership with John and June Cotten to develop the land.

In January 1988, the Barnetts contracted with the DeAtleys for road work on the land in exchange for 86 acres and a first right of refusal. Mr. DeAtley agreed to "pioneer" the road and later complete it. The parties disputed if the 1988 pioneering work done was according to the contract, but agree the final road work was never completed. The contract provided in the event Mr. Barnett "desires to sell or assign his contract with Anderson or to make any sales of property of three lots or tracts or more, that he will grant to DeAtley the first right of refusal to acquire same." Clerks Papers (CP) at 806.

In 1990, Mr. DeAtley met with Mr. Cotten after Mr. Cotten became ill and wanted to sell his partnership interest, but Mr. DeAtley decided against it. The DeAtleys' right of first refusal was not mentioned. In early 1991, the Barnetts bought out the Cottens' partnership interest. In July 1991, George A. Lagerquist and Henry and Nova Van Baalen joined the partnership, like the Cottens, to "own, maintain, develop, sell and otherwise deal with" the land. CP at 865.

In 1992, the DeAtleys petitioned for Chapter 7 bankruptcy relief in New Mexico, listing Mr. Barnett as a creditor for the road construction obligation. The DeAtleys did not separately list their right of first refusal as an asset. Mr. Barnett received notice of the bankruptcy, and later said he had only "a vague recollection" of it. CP at

518. The DeAtleys discharged the Barnett obligation in the 1992 New Mexico Bankruptcy.

In May 1997, the DeAtleys sued the Barnetts, alleging the 1991 transfers violated the DeAtleys' right of first refusal. The Barnetts denied the allegations, asserting several affirmative defenses, including waiver, estoppel, laches, and failure to perform conditions precedent regarding the completion of the final road.

Just before the scheduled 2003 trial date, the DeAtleys unsuccessfully moved to amend their complaint to add specific performance. On the day of trial, after expedited briefing, the DeAtleys' successfully argued the 1991 transfers triggered the DeAtleys' right of first refusal. About this time, when deposing Mr. DeAtley's father the Barnetts learned of the New Mexico bankruptcy. Investigating, the Barnetts learned the DeAtleys discharged the underlying obligation in the New Mexico bankruptcy. Immediately, the Barnetts' requested dismissal, successfully arguing the bankruptcy vitiated the first right of refusal. The DeAtleys' motion for reconsideration, based partly on the DeAtleys' alleged transfer of the parties' contract to a wholly-owned subsidiary, Wildones, Inc., d/b/a AD3 Company, was denied.

The Barnetts were partially successful in asking for attorney fees under the contract. The trial court limited the fees and costs to those associated with the motion to dismiss. The DeAtleys appeal the dismissal, the denial of their request for partial summary judgment regarding the final road issues, and the denial of their request to amend their complaint. The Barnetts cross-appeal the initial summary judgment order, regarding the DeAtleys' breach

of contract claims and the partial award of attorney fees. The appeals have been consolidated.

ANALYSIS

A. Impact of Bankruptcy

The dispositive issue is whether the trial court erred in dismissing the DeAtleys' complaint based upon its conclusion that the bankruptcy discharge of the Barnett-DeAtley contract obligation precluded the DeAtleys' right of first refusal claims. We review questions of law de novo. *Wolstein v. Yorkshire Ins. Co.*, 97 Wn. App. 201, 206, 985 P.2d 400 (1999).

The DeAtleys were required to disclose all assets, including potential causes of action in their bankruptcy petition. 11 U.S.C.A. § 521(1), Fed. R. Bankr. P. 1007. A discharged debtor lacks legal capacity to pursue an unscheduled claim simply because the trustee, having no knowledge of the claim, took no action with respect to the claim. *Linklater v. Johnson*, 53 Wn. App. 567, 570, 768 P.2d 1020 (1989); *Marks v. Benson*, 62 Wn. App. 178, 184-85, 813 P.2d 180 (1991). Even so, the DeAtleys contend their contract right assignment to AD3 Company before filing for bankruptcy effectively saved the first right of refusal.

However, if the DeAtleys wanted to assume the benefits of the allegedly triggered right of first refusal, they would have to assume the underlying obligation, the contract obligation to complete the road. Since the DeAtleys chose to discharge the burdens of that contract obligation and did not list their allegedly matured right of first refusal as an asset, we reason they lost their right to

claim benefits under the right of first refusal. Accordingly, we conclude the DeAtleys lacked standing to commence their breach of contract complaint.

Moreover, judicial integrity, finality of judgments and respect for the judicial process bar the DeAtleys' claim. Together these considerations are referred to as the Washington doctrine of judicial estoppel. *See, e.g., Markley v. Markley*, 31 Wn.2d 605, 614-15, 198 P.2d 486 (1948); *Johnson v. Si-Cor, Inc.*, 107 Wn. App. 902, 906, 28 P.3d 832 (2001).

Nonexclusive factors promote court discretion in applying judicial estoppel: "(1) The inconsistent position first asserted must have been successfully maintained; (2) a judgment must have been rendered; (3) the positions must be clearly inconsistent; (4) the parties and questions must be the same; (5) the party claiming estoppel must have been misled and have changed his position; (6) it must appear unjust to one party to permit the other to change." *Falkner v. Foshaug*, 108 Wn. App. 113, 125 n.35, 29 P.3d 771 (2001) (quoting *Raymond,* 47 Wn. App. at 785. The focus is upon the inconsistent position. *Falkner*, 108 Wn. App. at 125.

Judicial estoppel has been recently applied in a similar bankruptcy context. *Cunningham v. Reliable Concrete Pumping, Inc.* ___ Wn. App. ___, 108 P.3d 147 (2005). In *Cunningham*, Division One of this court invoked judicial estoppel to approve the summary dismissal of a personal injury claim when the plaintiffs had previously petitioned for bankruptcy, but failed to list in their bankruptcy schedules a third-party personal injury claim arising out of a workplace injury.

On the federal level judicial estoppel is well entrenched. In *New Hampshire v. Maine*, 532 U.S. 742, 121 S. Ct. 1808, 149 L. Ed. 2d 968 (2001), the United States Supreme Court invoked judicial estoppel, describing the doctrine as preventing "'perversion of the judicial process'" by not allowing parties to "'gain an advantage by litigation on one theory, and then seek[ing] an inconsistent advantage by pursuing an incompatible theory.'" *Id.* at 749 (quoting *In re Cassidy*, 892 F.2d 637, 641, *cert. denied*, 498 U.S. 812 (1990); 18B Charles A. Wright, Federal Practice and Procedure § 4477, at 549 (2002)).

The DeAtleys inconsistently received bankruptcy relief, and thereafter sought contradictory relief. Under these facts, we conclude judicial estoppel applies here to foreclose the DeAtleys' claim.

In sum, the lack of standing and judicial estoppel leads us to conclude the trial court did not err in dismissing the DeAtleys' complaint or in denying reconsideration. Therefore, it is unnecessary to analyze the parties other issues and contentions except those related to the Barnetts' attorney fees.

B. Attorney Fees at the Superior Court

The issue is whether the trial court erred in limiting the Barnetts' award of attorney fees to those incurred to bring their motion to dismiss. The Barnetts contend the court erred as a matter of law in finding the Barnetts delayed in bringing their motion to dismiss without just cause because the delay was caused by the DeAtleys' delay in providing requested discovery.

We review trial court's attorney fees award for an abuse of discretion. *Mahler v. Szucs*, 135 Wn.2d 398, 435, 957 P.2d 632 (1998). Abuse of discretion occurs when the trial court's decision rests on untenable grounds or untenable reasons. *State ex rel. Carroll v. Junkel*, 79 Wn.2d 12, 26, 482 P. 775 (1971).

The trial court reasoned the bankruptcy issue was known to the Barnetts well prior "to the end of 2003 and now here in 2004, the motion was always available to the defendants." Report of Proceedings at 3. The record supports the trial court's reasoning. For example, Mr. Barnett admitted he received notice of the DeAtleys' bankruptcy proceeding in 1992. Mr. Barnett assumed the DeAtleys abandoned the road building project so the bankruptcy notice did not make "an impression" on him. CP at 519. While the bankruptcy schedules were not received until 2003, the discharge of the road building obligation was sufficiently known to him to charge him with notice of the critical fact bearing upon the viability of the first right of refusal.

We defer to the trial court's personal and exhaustive contact with the issue. We limit our review to whether the judge's exercise of his discretion was manifestly unreasonable or based on untenable grounds or reasons. Mr. Barnett's recollection of the bankruptcy notice, while vague, was a tenable basis for the trial court to find the motion to dismiss could have been brought sooner. The trial court did not abuse its discretion in limiting the award.

C. Attorney Fees on Appeal

The Barnetts and Lookout Point request fees and costs on appeal pursuant to RAP 18.1. Attorney fees are

awarded pursuant to contract, statute, or a recognized ground of equity. *Wilkerson v. United Inv., Inc.*, 62 Wn. App. 712, 716, 815 P.2d 293 (1991). By statute, attorney fees are awarded to the prevailing party in an action on a contract that specifically provides for attorney fees and costs incurred to enforce its provisions. RCW 4.84.330.

The parties' agreement provides, "In the event any suit or action shall be instituted under this Agreement . . . the prevailing party in such suit or action shall be entitled to reasonable attorney's fees, together with such other assessable costs." CP at 807. A contract providing for the payment of attorney fees "'includes both fees necessary for trial and those incurred on appeal as well.'" *Boyd v. Davis*, 127 Wn.2d 256, 264, 897 P.2d 1239 (1995) (quoting *Granite Equip. Leasing Corp. v. Hutton*, 84 Wn.2d 320, 327, 525 P.2d 223 (1974)). As the prevailing parties on appeal, the Barnetts and Lookout Point are entitled to their attorney fees and costs here.

Affirmed.

/s/ Brown, J.
Brown, J.

WE CONCUR:

/s/ Kato C.J.
Kato, C.J.

/s/ Sweeney, J.
Sweeney, J.

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR YAKIMA COUNTY

ALAN DeATLEY and DEBRA DeATLEY, husband and wife, Plaintiffs, vs. LYNN BARNETT and MARLENE BARNETT, husband and wife, and LOOKOUT POINT PARTNERS, a partnership, Defendants.	NO. 97-2-01023-2 ORDER GRANTING DEFENDANTS' MOTION TO DISMISS ASSIGNED TO THE HONORABLE ROBERT HACKETT HEARING DATE: November 13, 2003 (Filed Nov. 13, 2003)

THIS MATTER came before the Court upon Defendants' Motion to Dismiss, with defendants Barnett appearing by and through their attorney of record. Annette Fitzsimmons, defendant Lookout Point Partners appearing by and through its attorney of record. Margaret Archer of Gordon, Thomas, Honeywell, Malanca, Peterson and Daheim, LLP and plaintiffs appearing by and through their attorney of record, James Perkins of Larson & Perkins, PLLC. The Court heard the argument of counsel and examined the records and files herein, including the following pleadings:

1. Defendants' Motion to Dismiss
2. Defendants' Memorandum in Support of Motion to Dismiss
3. Declaration of Margaret Archer in Support of Motion to Dismiss with attachments

4. Declaration of Lynn Barnett in Support of Motion to Dismiss

5. Declaration of Margaret Y. Archer Re: Facsimile Signature

6. Declaration of Donna Cratsenberg in Support of Motion to Dismiss

7. Declaration of Margaret Y. Archer Re: Facsimile Signature

8. Plaintiff's Memorandum in Opposition to Dismiss and Cross-Motion to Dismiss Road Claims

9. Alan DeAtley's Declaration in Opposition to Motion to Dismiss with attachments

10. Declaration of Jennie Deden Behles in Opposition to Motion to Dismiss with attachments

11. James A. Perkins' Declaration Opposing Motion to Dismiss with attachments

12. Supplemental Declaration of Margaret Archer in Support of Motion to Dismiss with attachments

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Defendant's Motion to dismiss is GRANTED and plaintiffs' claims are dismissed in their entirety with prejudice. ~~Defendants may present a motion for attorneys' fees and costs at a later date.~~ [RNH, J.]

DONE IN OPEN COURT this 13 day of Nov, 2003.

/s/ Robert N. Hackett, J.
THE HONORABLE
ROBERT HACKETT

Presented by:

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James A. Perkins, WSBA #13330

THE SUPREME COURT OF WASHINGTON

ALAN DeATLEY and DEBRA DeATLEY, husband and wife, Petitioners, v. LYNN BARNETT and MARLENE BARNETT, husband and wife, and LOOKOUT POINT PARTNERS, Respondents.	NO. 77442-1 **ORDER** C/A NO. 22780-4-III & 22977-7-III (consolidated)

Department II of the Court, composed of Chief Justice Alexander and Justices Madsen, Bridge, Owens, and J.M. Johnson (Justice Fairhurst sat for Justice Bridge), considered this matter at its March 7, 2006, Motion Calendar, and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the Petition for Review is denied. The motion to strike reply is granted.

DATED at Olympia, Washington this 8th day of March, 2006.

For the Court

/s/ Gerry L. Alexander
CHIEF JUSTICE

11 USCS § 541 (1992) Property of the estate

(a) The commencement of a case under section 301, 302, or 303 of this title [11 USCS § 301, 302, or 303] creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

(2) All interests of the debtor and the debtor's spouse in community property as of the commencement of the case that is –

(A) under the sole, equal, or joint management and control of the debtor; or

(B) liable for an allowable claim against the debtor, or for both an allowable claim against the debtor and an allowable claim against the debtor's spouse, to the extent that such interest is so liable.

(3) Any interest in property that the trustee recovers under section 329(b), 363(n), 543, 550, 553, or 723 of this title [11 USCS § 329(b), 363(n), 543, 550, 553, or 723].

(4) My interest in property preserved for the benefit of or ordered transferred to the estate under section 510(c) or 551 of this title [11 USCS § 510(c) or 551].

(5) Any interest in property that would have been property of the estate if such interest had been an interest of the debtor on the date of the filing of the petition, and that the debtor acquires or becomes entitled to acquire within 180 days after such date –

(A) by bequest, devise, or inheritance;

(B) as a result of a property settlement agreement with the debtor's spouse, or of an interlocutory or final divorce decree; or

(C) as a beneficiary of a life insurance policy or of a death benefit plan.

(6) Proceeds, product, offspring, rents, or profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case.

(7) Any interest in property that the estate acquires after the commencement of the case.

(b) Property of the estate does not include –

(1) any power that the debtor may exercise solely for the benefit of an entity other than the debtor;

(2) any interest of the debtor as a lessee under a lease of nonresidential real property that has terminated at the expiration of the stated term of such lease before the commencement of the case under this title, and ceases to include any interest of the debtor as a lessee under a lease of nonresidential real property that has terminated at the expiration of the stated term of such lease during the case;

(3) any eligibility of the debtor to participate in programs authorized under the Higher Education Act of 1965 (20 U.S.C. 1001 et seq.; 42 U.S.C. 2751 et seq.), or any accreditation status or State licensure of the debtor as an educational institution;

(4) any interest of the debtor in liquid or gaseous hydrocarbons to the extent that –

(A)

(i) the debtor has transferred or has agreed to transfer such interest pursuant to a farmout agreement or any written agreement directly related to a farmout agreement; and

(ii) but for the operation of this paragraph, the estate could include the interest referred to in clause (i) only by virtue of section 365 or 544(a)(3) of this title [11 USCS § 365 or 544(a)(3)]; or

(B)

(i) the debtor has transferred such interest pursuant to a written conveyance of a production payment to an entity that does not participate in the operation of the property from which such production payment is transferred; and

(ii) but for the operation of this paragraph, the estate could include the interest referred to in clause (i) only by virtue of section 365 or 542 of this title [11 USCS § 365 or 542];

(5) funds placed in an education individual retirement account (as defined in section 530(b)(1) of the Internal Revenue Code of 1986 [26 USCS § 530(b)(1)]) not later than 365 days before the date of the filing of the petition in a case under this title, but –

(A) only if the designated beneficiary of such account was a child, stepchild, grandchild, or stepgrandchild of the debtor for the taxable year for which funds were placed in such account;

(B) only to the extent that such funds –

(i) are not pledged or promised to any entity in connection with any extension of credit; and

(ii) are not excess contributions (as described in section 4973(e) of the Internal Revenue Code of 1986 [26 USCS § 4973(e)]); and

(C) in the case of funds placed in all such accounts having the same designated beneficiary not earlier than 720 days nor later than 365 days before such date, only so much of such funds as does not exceed $5,000;

(6) funds used to purchase a tuition credit or certificate or contributed to an account in accordance with section 529(b)(1)(A) of the Internal Revenue Code of 1986 [26 USCS § 529(b)(1)(A)] under a qualified State tuition program (as defined in section 529(b)(1) of such Code [26 USCS § 529(b)(1)]) not later than 365 days before the date of the filing of the petition in a case under this title, but –

(A) only if the designated beneficiary of the amounts paid or contributed to such tuition program was a child, stepchild, grandchild, or stepgrandchild of the debtor for the taxable year for which funds were paid or contributed;

(B) with respect to the aggregate amount paid or contributed to such program having the same designated beneficiary, only so much of such amount as does not exceed the total contributions permitted under section 529(b)(7) of such Code [26 USCS § 529(b)(7)] with respect to such beneficiary, as adjusted beginning on the date of the filing of the petition in a case under this title by the annual increase or decrease (rounded to the nearest tenth of 1 percent) in the education expenditure category of the

Consumer Price Index prepared by the Department of Labor; and

(C) in the case of funds paid or contributed to such program having the same designated beneficiary not earlier than 720 days nor later than 365 days before such date, only so much of such funds as does not exceed $5,000;

(7) any amount –

(A) withheld by an employer from the wages of employees for payment as contributions –

(i) to –

(I) an employee benefit plan that is subject to title I of the Employee Retirement Income Security Act of 1974 [29 USCS §§ 1001 et seq.] or under an employee benefit plan which is a governmental plan under section 414(d) of the Internal Revenue Code of 1986 [26 USCS § 414(d)];

(II) a deferred compensation plan under section 457 of the Internal Revenue Code of 1986 [26 USCS § 457]; or

(III) a tax-deferred annuity under section 403(b) of the Internal Revenue Code of 1986 [26 USCS § 403(b)]; except that such amount under this subparagraph shall not constitute disposable income as defined in section 1325(b)(2) [11 USCS § 1325(b)(2)]; or

(ii) to a health insurance plan regulated by State law whether or not subject to such title; or

(B) received by an employer from employees for payment as contributions –

(i) to –

(I) an employee benefit plan that is subject to title I of the Employee Retirement Income Security Act of 1974 [29 USCS §§ 1001 et seq.] or under an employee benefit plan which is a governmental plan under section 414(d) of the Internal Revenue Code of 1986 [26 USCS § 414(d)];

(II) a deferred compensation plan under section 457 of the Internal Revenue Code of 1986 [26 USCS § 457]; or

(III) a tax-deferred annuity under section 403(b) of the Internal Revenue Code of 1986 [26 USCS § 403(b)];

except that such amount under this subparagraph shall not constitute disposable income, as defined in section 1325(b)(2) [11 USCS § 1325(b)(2)]; or

(ii) to a health insurance plan regulated by State law whether or not subject to such title;

(8) subject to subchapter III of chapter 5 [11 USCS §§ 541 et seq.], any interest of the debtor in property where the debtor pledged or sold tangible personal property (other than securities or written or printed evidences of indebtedness or title) as collateral for a loan or advance of money given by a person licensed under law to make such loans or advances, where –

(A) the tangible personal property is in the possession of the pledgee or transferee;

(B) the debtor has no obligation to repay the money, redeem the collateral, or buy back the property at a stipulated price; and

(C) neither the debtor nor the trustee have exercised any right to redeem provided under the contract or State law, in a timely manner as provided under State law and section 108(b) [11 USCS § 108(b)]; or

(9) any interest in cash or cash equivalents that constitute proceeds of a sale by the debtor of a money order that is made –

(A) on or after the date that is 14 days prior to the date on which the petition is filed; and

(B) under an agreement with a money order issuer that prohibits the commingling of such proceeds with property of the debtor (notwithstanding that, contrary to the agreement, the proceeds may have been commingled with property of the debtor),

unless the money order issuer had not taken action, prior to the filing of the petition, to require compliance with the prohibition.

Paragraph (4) shall not be construed to exclude from the estate any consideration the debtor retains, receives, or is entitled to receive for transferring an interest in liquid or gaseous hydrocarbons pursuant to a farmout agreement.

(c)

(1) Except as provided in paragraph (2) of this subsection, an interest of the debtor in property becomes property of the estate under subsection (a)(1), (a)(2), or (a)(5) of this section notwithstanding any provision in an

agreement, transfer instrument, or applicable nonbankruptcy law –

(A) that restricts or conditions transfer of such interest by the debtor; or

(B) that is conditioned on the insolvency or financial condition of the debtor, on the commencement of a case under this title, or on the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement, and that effects or gives an option to effect a forfeiture, modification, or termination of the debtor's interest in property.

(2) A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title.

(d) Property in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest, such as a mortgage secured by real property, or an interest in such a mortgage, sold by the debtor but as to which the debtor retains legal title to service or supervise the servicing of such mortgage or interest, becomes property of the estate under subsection (a)(1) or (2) of this section only to the extent of the debtor's legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold.

(e) In determining whether any of the relationships specified in paragraph (5)(A) or (6)(A) of subsection (b) exists, a legally adopted child of an individual (and a child who is a member of an individual's household, if placed with such individual by an authorized placement agency for legal adoption by such individual), or a foster child of

an individual (if such child has as the child's principal place of abode the home of the debtor and is a member of the debtor's household) shall be treated as a child of such individual by blood.

(f) Notwithstanding any other provision of this title, property that is held by a debtor that is a corporation described in section 501(c)(3) of the Internal Revenue Code of 1986 [26 USCS § 501(c)(3)] and exempt from tax under section 501(a) of such Code [26 USCS § 501(a)] may be transferred to an entity that is not such a corporation, but only under the same conditions as would apply if the debtor had not filed a case under this title.

HISTORY:

(Nov. 6, 1978, P.L. 95-598, Title I, § 101, 92 Stat. 2594; July 10, 1984, P.L. 98-353, Title III, Subtitle C, § 363(a), Subtitle H, § 456, 98 Stat. 363, 376; Nov. 5, 1990, P.L. 101-508, Title III, Subtitle A, § 3007(a)(2), 104 Stat. 1388-28; Oct. 24, 1992, P.L. 102-486, Title XXX, Subtitle B, § 3017(b), 106 Stat. 3130; Oct. 22, 1994, P.L. 103-394, Title II, §§ 208(b), 223, 108 Stat. 4124, 4129.)

(As amended April 20, 2005, P.L. 109-8, Title II, Subtitle C, § 225(a), Title III, § 323, Title XII, §§ 1212, 1221(c), 1230, 119 Stat. 65, 97, 194, 196, 201.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Prior law and revision:

Legislative Statements

Section 541(a)(7) is new. The provision clarifies that any interest in property that the estate acquires after the

commencement of the case is property of the estate; for example, if the estate enters into a contract, after the commencement of the case, such a contract would be property of the estate. The addition of this provision by the House amendment merely clarifies that section 541(a) is an all-embracing definition which includes charges on property, such as liens held by the debtor on property of a third party, or beneficial rights and interests that the debtor may have in property of another. However, only the debtor's interest in such property becomes property of the estate. If the debtor holds bare legal title or holds property in trust for another, only those rights which the debtor would have otherwise had emanating from such interest pass to the estate under section 541. Neither this section nor section 545 will affect various statutory provisions that give a creditor a lien that is valid both inside and outside bankruptcy against a bona fide purchaser of property from the debtor, or that creates a trust fund for the benefit of creditors meeting similar criteria. See Packers and Stockyards Act § 206, 7 U.S.C. 196 (1976).

Section 541(c)(2) follows the position taken in the House bill and rejects the position taken in the Senate amendment with respect to income limitations on a spendthrift trust.

Section 541(d) of the House amendment is derived from section 541(e) of the Senate amendment and reiterates the general principle that where the debtor holds bare legal title without any equitable interest, that the estate acquires bare legal title without any equitable interest in the property. The purpose of section 541(d) as applied to the secondary mortgage market is identical to the purpose of section 541(e) of the Senate amendment and section 541(d) will accomplish the same result as would have been

accomplished by section 541(e). Even if a mortgage seller retains for purposes of servicing legal title to mortgages or interests in mortgages sold in the secondary mortgage market, the trustee would be required by section 541(d) to turn over the mortgages or interests in mortgages to the purchaser of those mortgages.

The seller of mortgages in the secondary mortgage market will often retain the original mortgage notes and related documents and the seller will not endorse the notes to reflect the sale to the purchaser. Similarly, the purchaser will often not record the purchaser's ownership of the mortgages or interests in mortgages under State recording statutes. These facts are irrelevant and the seller's retention of the mortgage documents and the purchaser's decision not to record do not change the trustee's obligation to turn the mortgages or interests in mortgages over to the purchaser. The application of section 541(d) to secondary mortgage market transactions will not be affected by the terms of the servicing agreement between the mortgage servicer and the purchaser of the mortgages. Under section 541(d), the trustee is required to recognize the purchaser's title to the mortgages or interests in mortgages and to turn this property over to the purchaser. It makes no difference whether the servicer and the purchaser characterize their relationship as one of trust, agency, or independent contractor.

The purpose of section 541(d) as applied to the secondary mortgage market is therefore to make certain that secondary mortgage market sales as they are currently structured are not subject to challenge by bankruptcy trustees and that purchasers of mortgages will be able to obtain the mortgages or interests in mortgages which they have purchased from trustees without the trustees asserting

that a sale of mortgages is a loan from the purchaser to the seller.

Thus, as section 541(a)(1) clearly states, the estate is comprised of all legal or equitable interests of the debtor in property as of the commencement of the case. To the extent such an interest is limited in the hands of the debtor, it is equally limited in the hands of the estate except to the extent that defenses which are personal against the debtor are not effective against the estate.

Property of the estate: The Senate amendment provided that property of the estate does not include amounts held by the debtor as trustee and any taxes withheld or collected from others before the commencement of the case. The House amendment removes these two provisions. As to property held by the debtor as a trustee, the House amendment provides that property of the estate will include whatever interest the debtor held in the property at the commencement of the case. Thus, where the debtor held only legal title to the property and the beneficial interest in that property belongs to another, such as exists in the case of property held in trust, the property of the estate includes the legal title, but not the beneficial interest in the property.

As to withheld taxes, the House amendment deletes the rule in the Senate bill as unnecessary since property of the estate does not include the beneficial interest in property held by the debtor as a trustee. Under the Internal Revenue Code of 1954 (section 7501) [26 U.S.C. 7501], the amounts of withheld taxes are held to be a special fund in trust for the United States. Where the Internal Revenue Service can demonstrate that the amounts of taxes withheld are still in the possession of the debtor at the commencement

of the case, then if a trust is created, those amounts are not property of the estate. Compare In re Shakesteers Coffee Shops, 546 F.2d 821 (9th Cir. 1976) with In re Glynn Wholesale Building Materials, Inc. (S.D. Ga. 1978) and In re Progress Tech Colleges, Inc., 42 Aftr 2d 78-5573 (S.D. Ohio 1977).

Where it is not possible for the Internal Revenue Service to demonstrate that the amounts of taxes withheld are still in the possession of the debtor at the commencement of the case, present law generally includes amounts of withheld taxes as property of the estate. See, e.g., United States v. Randall, 401 U.S. 513 (1973) [91 S. Ct. 991, 28 L.Ed.2d 273] and In re Tamasha Town and County Club, 483 F.2d 1377 (9th Cir. 1973). Nonetheless, a serious problem exists where "trust fund taxes" withheld from others are held to be property of the estate where the withheld amounts are commingled with other assets of the debtor. The courts should permit the use of reasonable assumptions under which the Internal Revenue Service, and other tax authorities, can demonstrate that amounts of withheld taxes are still in the possession of the debtor at the commencement of the case. For example, where the debtor had commingled that amount of withheld taxes in his general checking account. it might be reasonable to assume that any remaining amounts in that account on the commencement of the case are the withheld taxes. In addition, Congress may consider future amendments to the Internal Revenue Code [title 26] making clear that amounts of withheld taxes are held by the debtor in a trust relationship and, consequently, that such amounts are not property of the estate.

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This section defines property of the estate, and specifies what property becomes property of the estate. The commencement of a bankruptcy case creates an estate. Under paragraph (1) of subsection (a), the estate is comprised of all legal or equitable interest of the debtor in property, wherever located as of the commencement of the case. The scope of this paragraph is broad. It includes all kinds of property, including tangible or intangible property, causes of action (see Bankruptcy Act § 70a(6) [section 110(a)(6) of former title 11]), and all other forms of property currently specified in section 70a of the Bankruptcy Act § 70a [section 110(a) of former title 11], as well as property recovered by the trustee under section 542 of proposed title 11, if the property recovered was merely out of the possession of the debtor, yet remained "property of the debtor." The debtor's interest in property also includes "title" to property, which is an interest, just as are a possessory interest, or lease-hold interest, for example. The result of Segal v. Rochelle, 382 U.S. 375 (1966), is followed, and the right to a refund is property of the estate.

Though this paragraph will include choses in action and claims by the debtor against others, it is not intended to expand the debtor's rights against others more than they exist at the commencement of the case. For example, if the debtor has a claim that is barred at the time of the commencement of the case by the statute of limitations, then the trustee would not be able to pursue that claim, because he too would be barred. He could take no greater rights than the debtor himself had. But see proposed 11 U.S.C. 108, which would permit the trustee a tolling of the

statute of limitations if it had not run before the date of the filing of the petition.

Paragraph (1) has the effect of overruling Lockwood v. Exchange Bank, 190 U.S. 294 (1903), because it includes as property of the estate all property of the debtor, even that needed for a fresh start. After the property comes into the estate, then the debtor is permitted to exempt it under proposed 11 U.S.C. 522, and the court will have jurisdiction to determine what property may be exempted and what remains as property of the estate. The broad jurisdictional grant in proposed 28 U.S.C. 1334 would have the effect of overruling Lockwood independently of the change made by this provision.

Paragraph (1) also has the effect of overruling Lines v. Frederick, 400 U.S. 18 (1970).

Situations occasionally arise where property ostensibly belonging to the debtor will actually not be property of the debtor, but will be held in trust for another. For example, if the debtor has incurred medical bills that were covered by insurance, and the insurance, company had sent the payment of the bills to the debtor before the debtor had paid the bill for which the payment was reimbursement, the payment would actually be held in a constructive trust for the person to whom the bill was owed. This section and proposed 11 U.S.C. 545 also will not affect various statutory provisions that give a creditor of the debtor a lien that is valid outside as well as inside bankruptcy, or that creates a trust fund for the benefit of a creditor of the debtor. See Packers and Stockyards Act § 206, 7 U.S.C. 196.

Bankruptcy Act § 8 [section 26 of former title 11] has been deleted as unnecessary. Once the estate is created, no

interests in property of the estate remain in the debtor. Consequently, if the debtor dies during the case, only property exempted from property of the estate or acquired by the debtor after the commencement of the case and not included as property of the estate will be available to the representative of the debtor's probate estate. The bankruptcy proceeding will continue in rem with respect to property of the state, and the discharge will apply in personam to relieve the debtor, and thus his probate representative, of liability for dischargeable debts.

The estate also includes the interests of the debtor and the debtor's spouse in community property, subject to certain limitations; property that the trustee recovers under the avoiding powers; property that the debtor acquires by bequest, devise, inheritance, a property settlement agreement with the debtor's spouse, or as the beneficiary of a life insurance policy within 180 days after the petition; and proceeds, product, offspring, rents, and profits of or from property of the estate, except such as are earning from services performed by an individual debtor after the commencement of the case. Proceeds here is not used in a confining sense, as defined in the Uniform Commercial Code, but is intended to be a broad term to encompass all proceeds of property of the estate. The conversion in form of property of the estate does not change its character as property of the estate.

Subsection (b) excludes from property of the estate any power, such as a power of appointment, that the debtor may exercise solely for the benefit of an entity other than the debtor [see the 1984 amendment of subsec. (b) of this section]. This changes present law which excludes powers solely benefiting other persons but not other entities.

Subsection (c) invalidates restrictions on the transfer of property of the debtor, in order that all of the interests of the debtor in property will become property of the estate. The provisions invalidated are those that restrict or condition transfer of the debtor's interest, and those that are conditioned on the insolvency or financial condition of the debtor, on the commencement of a bankruptcy case, or on the appointment of a custodian of the debtor's property. Paragraph (2) of subsection (c), however, preserves restrictions on a transfer of a spendthrift trust that the restriction is enforceable nonbankruptcy law to the extent of the income reasonably necessary for the support of a debtor and his dependents.

Subsection (d) [now (e)], derived from section 70c of the Bankruptcy Act [section 110(c) of former title 11], gives the estate the benefit of all defenses available to the debtor as against an entity other than the estate, including such defenses as statutes of limitations, statutes of frauds, usury, and other personal defenses, and makes waiver by the debtor after the commencement of the case ineffective to bind the estate [this subsec. was repealed by Act July 10, 1984; see the 1984 Amendments note to this section].

Section 541(e) [now (d)] confirms the current status under the Bankruptcy Act [former title 11] of bona fide secondary mortgage market transactions as the purchase and sale of assets. Mortgages or interests in mortgages sold in the secondary market should not be considered as part of the debtor's estate. To permit the efficient servicing of mortgages or interests in mortgages the seller often retains the original mortgage notes and related documents, and the purchaser records under State recording statutes the purchaser's ownership of the mortgages or

interests in mortgages purchased. Section 541(e) [now (d)] makes clear that the seller's retention of the mortgage documents and the purchaser's decision not to record do not impair the asset sale character of secondary mortgage market transactions. The committee notes that in secondary mortgage market transactions the parties may characterize their relationship as one of trust, agency, or independent contractor. The characterization adopted by the parties should not affect the statutes in bankruptcy on bona fide secondary mortgage market purchases and sales.

Effective date of section:

This section became effective on October 1, 1979, pursuant to § 402(a) of Act Nov. 6, 1978, P.L. 95-598, which appears as 11 USCS prec § 101 note.

Amendments:

1984. Act July 10, 1984, in subsec. (a), in the introductory matter, deleted "under" following "under" and inserted "and by whomever held", in para. (3), inserted "329(b), 363(n)," in para. (5), in the introductory matter, substituted "Any" for "An", and, in para. (6), substituted "or" for "and" preceding "profits"; substituted subsec. (b) for one which read: "Property of the estate does not include any power that the debtor may only exercise solely for the benefit of an entity other than the debtor."; in subsec. (c)(1), in the introductory matter, inserted "in an agreement, transfer instrument, or applicable nonbankruptcy law", and in sub para. (B), substituted "taking" for "the taking" and inserted "before such commencement"; in subsec. (d), inserted "(1) or (2)"; and deleted subsec. (e), which read: "The estate shall have the benefit of any defense available to the debtor as against an entity other than the estate, including statutes of limitation, statutes

of frauds, usury, and other personal defenses. A waiver of any such defense by the debtor after the commencement of the case does not bind the estate.".

1990. Act Nov. 5, 1990 (effective as provided by § 3007(a)(3) of such Act, which appears as 11 USCS § 362 note), in subsec. (b), in para. (1), deleted "or" after the concluding semicolon, in para. (2), substituted "; or" for the concluding period, and added para. (3).

1992. Act Oct. 24, 1992 (effective and applicable as provided by § 3017(c) of such Act, which appears as 11 USCS § 101 note), in subsec. (b), in para. (2), deleted "or" following the semicolon, in para. (3), substituted "or" for the concluding period, added para. (4), and added the concluding matter.

1994. Act Oct. 22, 1994 (effective on enactment and inapplicable with respect to cases commenced before enactment, as provided by § 702 of such Act, which appears as 11 USCS § 101 note), in subsec. (b), in para. (3), substituted the concluding semicolon for "or", in para. (4), in subpara. (A), designated the existing provisions as cl. (i), redesignated former subpara. (B) as subpara. (A), cl. (ii), and in cl. (ii) as so designated, substituted "the interest referred to in clause (i)" for "such interest" and substituted "; or" for a concluding period, and added a new subpara. (B), and added para. (5).

Such Act further (effective as above) purported to amend subsec. (b)(4) by striking a period at the end and inserting "; or"; however, the amendment was executed by substituting "; or" for a concluding semicolon in order to effectuate the probable intent of Congress.

2005. Act April 20, 2005 (effective 180 days after enactment and inapplicable to cases commenced before the effective date, as provided by § 1501 of such Act, which appears as 11 USCS § 101 note), in subsec. (b), in para. (4), in subpara. (B)(ii), inserted "365 or", and deleted "or" following the concluding semicolon, redesignated para. (5) as para. (9), and inserted paras. (5)-(8); and added subsec. (e).

Such Act further (applicable as provided by § 1221(d) of such Act, which appears as 11 USCS § 363 note), added subsec. (f).

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11 USCS § 524 (1992) Effect of discharge

(a) A discharge in a case under this title [11 USCS §§ 101 et seq.] –

(1) voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged under section 727, 944, 1141, 1228, or 1328 of this title [11 USCS § 727, 944, 1141, 1228, or 1328], whether or not discharge of such debt is waived;

(2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived; and

(3) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect or recover from, or offset against, property of the debtor of the kind specified in

section 541(a)(2) of this title [11 USCS § 541(a)(2)] that is acquired after the commencement of the case, on account of any allowable community claim, except a community claim that is excepted from discharge under section 523, 1228(a)(1), or 1328(a)(1) [11 USCS § 1228(a)(1), or 1328(a)(1)], or that would be so excepted, determined in accordance with the provisions of sections 523(c) and 523(d) of this title [11 USCS §§ 523(c) and 523(d)], in a case concerning the debtor's spouse commenced on the date of the filing of the petition in the case concerning the debtor, whether or not discharge of the debt based on such community claim is waived.

(b) Subsection (a)(3) of this section does not apply if –

(1) (A) the debtor's spouse is a debtor in a case under this title, or a bankrupt or a debtor in a case under the Bankruptcy Act, commenced within six years of the date of the filing of the petition in the case concerning the debtor; and

(B) the court does not grant the debtor's spouse a discharge in such case concerning the debtor's spouse; or

(2) (A) the court would not grant the debtor's spouse a discharge in a case under chapter 7 of this title [11 USCS §§ 701 et seq.] concerning such spouse commenced on the date of the filing of the petition in the case concerning the debtor; and

(B) a determination that the court would not so grant such discharge is made by the bankruptcy court within the time and in the manner provided for a determination under section 727 of this title [11 USCS § 727] of whether a debtor is granted a discharge.

(c) An agreement between a holder of a claim and the debtor, the consideration for which, in whole or in part, is based on a debt that is dischargeable in a case under this title is enforceable only to any extent enforceable under applicable nonbankruptcy law, whether or not discharge of such debt is waived, only if –

(1) such agreement was made before the granting of the discharge under section 727, 1141, 1228, or 1328 of this title [11 USCS § 727, 1141, 1228, or 1328];

(2) the debtor received the disclosures described in subsection (k) at or before the time at which the debtor signed the agreement;

(3) such agreement has been filed with the court and, if applicable, accompanied by a declaration or an affidavit of the attorney that represented the debtor during the course of negotiating an agreement under this subsection, which states that –

(A) such agreement represents a fully informed and voluntary agreement by the debtor;

(B) such agreement does not impose an undue hardship on the debtor or a dependent of the debtor; and

(C) the attorney fully advised the debtor of the legal effect and consequences of –

(i) an agreement of the kind specified in this subsection; and

(ii) any default under such an agreement;

(4) the debtor has not rescinded such agreement at any time prior to discharge or within sixty days after such

agreement is filed with the court, whichever occurs later, by giving notice of rescission to the holder of such claim;

(5) the provisions of subsection (d) of this section have been complied with; and

(6) (A) in a case concerning an individual who was not represented by an attorney during the course of negotiating an agreement under this subsection, the court approves such agreement as –

(i) not imposing an undue hardship on the debtor or a dependent of the debtor; and

(ii) in the best interest of the debtor.

(B) Subparagraph (A) shall not apply to the extent that such debt is a consumer debt secured by real property.

(d) In a case concerning an individual, when the court has determined whether to grant or not to grant a discharge under section 727, 1141, 1228, or 1328 of this title [11 USCS § 727, 1141, 1228, or 1328], the court may hold a hearing at which the debtor shall appear in person. At any such hearing, the court shall inform the debtor that a discharge has been granted or the reason why a discharge has not been granted. If a discharge has been granted and if the debtor desires to make an agreement of the kind specified in subsection (c) of this section and was not represented by an attorney during the course of negotiating such agreement, then the court shall hold a hearing at which the debtor shall appear in person and at such hearing the court shall –

(1) inform the debtor –

(A) that such an agreement is not required under this title, under nonbankruptcy law, or under any agreement not made in accordance with the provisions of subsection (c) of this section; and

(B) of the legal effect and consequences of –

(i) an agreement of the kind specified in subsection (c) of this section; and

(ii) a default under such an agreement; and

(2) determine whether the agreement that the debtor desires to make complies with the requirements of subsection (c)(6) of this section, if the consideration for such agreement is based in whole or in part on a consumer debt that is not secured by real property of the debtor.

(e) Except as provided in subsection (a)(3) of this section, discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt.

(f) Nothing contained in subsection (c) or (d) of this section prevents a debtor from voluntarily repaying any debt.

(g) (1) (A) After notice and hearing, a court that enters an order confirming a plan of reorganization under chapter 11 [11 USCS §§ 1101 et seq.] may issue, in connection with such order, an injunction in accordance with this subsection to supplement the injunctive effect of a discharge under this section.

(B) An injunction may be issued under subparagraph (A) to enjoin entities from taking legal action for the

purpose of directly or indirectly collecting, recovering, or receiving payment or recovery with respect to any claim or demand that, under a plan of reorganization, is to be paid in whole or in part by a trust described in paragraph (2)(B)(i), except such legal actions as are expressly allowed by the injunction, the confirmation order, or the plan of reorganization.

(2) (A) Subject to subsection (h), if the requirements of subparagraph (B) are met at the time an injunction described in paragraph (1) is entered, then after entry of such injunction, any proceeding that involves the validity, application, construction, or modification of such injunction, or of this subsection with respect to such injunction, may be commenced only in the district court in which such injunction was entered, and such court shall have exclusive jurisdiction over any such proceeding without regard to the amount in controversy.

(B) The requirements of this subparagraph are that –

(i) the injunction is to be implemented in connection with a trust that, pursuant to the plan of reorganization –

(I) is to assume the liabilities of a debtor which at the time of entry of the order for relief has been named as a defendant in personal injury, wrongful death, or property-damage actions seeking recovery for damages allegedly caused by the presence of, or exposure to, asbestos or asbestos-containing products;

(II) is to be funded in whole or in part by the securities of 1 or more debtors involved in such plan

and by the obligation of such debtor or debtors to make future payments, including dividends;

(III) is to own, or by the exercise of rights granted under such plan would be entitled to own if specified contingencies occur, a majority of the voting shares of –

(aa) each such debtor;

(bb) the parent corporation of each such debtor; or

(cc) a subsidiary of each such debtor that is also a debtor; and

(IV) is to use its assets or income to pay claims and demands; and

(ii) subject to subsection (h), the court determines that –

(I) the debtor is likely to be subject to substantial future demands for payment arising out of the same or similar conduct or events that gave rise to the claims that are addressed by the injunction;

(II) the actual amounts, numbers, and timing of such future demands cannot be determined;

(III) pursuit of such demands outside the procedures prescribed by such plan is likely to threaten the plan's purpose to deal equitably with claims and future demands;

(IV) as part of the process of seeking confirmation of such plan –

(aa) the terms of the injunction proposed to be issued under paragraph (1)(A), including any provisions barring actions against third parties pursuant to paragraph (4)(A), are set out in such plan and in any disclosure statement supporting the plan; and

(bb) a separate class or classes of the claimants whose claims are to be addressed by a trust described in clause (i) is established and votes, by at least 75 percent of those voting, in favor of the plan; and

(V) subject to subsection (h), pursuant to court orders or otherwise, the trust will operate through mechanisms such as structured, periodic, or supplemental payments, pro rata distributions, matrices, or periodic review of estimates of the numbers and values of present claims and future demands, or other comparable mechanisms, that provide reasonable assurance that the trust will value, and be in a financial position to pay, present claims and future demands that involve similar claims in substantially the same manner.

(3) (A) If the requirements of paragraph (2)(B) are met and the order confirming the plan of reorganization was issued or affirmed by the district court that has jurisdiction over the reorganization case, then after the time for appeal of the order that issues or affirms the plan –

(i) the injunction shall be valid and enforceable and may not be revoked or modified by any court except through appeal in accordance with paragraph (6);

(ii) no entity that pursuant to such plan or thereafter becomes a direct or indirect transferee of, or successor to any assets of, a debtor or trust that is the subject of the injunction shall be liable with respect to any

claim or demand made against such entity by reason of its becoming such a transferee or successor; and

(iii) no entity that pursuant to such plan or thereafter makes a loan to such a debtor or trust or to such a successor or transferee shall, by reason of making the loan, be liable with respect to any claim or demand made against such entity, nor shall any pledge of assets made in connection with such a loan be upset or impaired for that reason;

(B) Subparagraph (A) shall not be construed to –

(i) imply that an entity described in subparagraph (A)(ii) or (iii) would, if this paragraph were not applicable, necessarily be liable to any entity by reason of any of the acts described in subparagraph (A);

(ii) relieve any such entity of the duty to comply with, or of liability under, any Federal or State law regarding the making of a fraudulent conveyance in a transaction described in subparagraph (A)(ii) or (iii); or

(iii) relieve a debtor of the debtor's obligation to comply with the terms of the plan of reorganization, or affect the power of the court to exercise its authority under sections 1141 and 1142 [11 USCS §§ 1141 and 1142] to compel the debtor to do so.

(4) (A) (i) Subject to subparagraph (B), an injunction described in paragraph (1) shall be valid and enforceable against all entities that it addresses.

(ii) Notwithstanding the provisions of section 524(e) [11 USCS § 524(e)], such an injunction may bar any action directed against a third party who is identifiable from the terms of such injunction (by name or

as part of an identifiable group) and is alleged to be directly or indirectly liable for the conduct of, claims against, or demands on the debtor to the extent such alleged liability of such third party arises by reason of –

(I) the third party's ownership of a financial interest in the debtor, a past or present affiliate of the debtor, or a predecessor in interest of the debtor;

(II) the third party's involvement in the management of the debtor or a predecessor in interest of the debtor, or service as an officer, director or employee of the debtor or a related party;

(III) the third party's provision of insurance to the debtor or a related party; or

(IV) the third party's involvement in a transaction changing the corporate structure, or in a loan or other financial transaction affecting the financial condition, of the debtor or a related party, including but not limited to –

(aa) involvement in providing financing (debt or equity), or advice to an entity involved in such a transaction; or

(bb) acquiring or selling a financial interest in an entity as part of such a transaction.

(iii) As used in this subparagraph, the term "related party" means –

(I) a past or present affiliate of the debtor;

(II) a predecessor in interest of the debtor; or

(III) any entity that owned a financial interest in –

(aa) the debtor;

(bb) a past or present affiliate of the debtor; or

(cc) a predecessor in interest of the debtor.

(B) Subject to subsection (h), if, under a plan of reorganization, a kind of demand described in such plan is to be paid in whole or in part by a trust described in paragraph (2)(B)(i) in connection with which an injunction described in paragraph (1) is to be implemented, then such injunction shall be valid and enforceable with respect to a demand of such kind made, after such plan is confirmed, against the debtor or debtors involved, or against a third party described in subparagraph (A)(ii), if –

(i) as part of the proceedings leading to issuance of such injunction, the court appoints a legal representative for the purpose of protecting the rights of persons that might subsequently assert demands of such kind, and

(ii) the court determines, before entering the order confirming such plan, that identifying such debtor or debtors, or such third party (by name or as part of an identifiable group), in such injunction with respect to such demands for purposes of this subparagraph is fair and equitable with respect to the persons that might subsequently assert such demands, in light of the benefits provided, or to be provided, to such trust on behalf of such debtor or debtors or such third party.

(5) In this subsection, the term "demand" means a demand for payment, present or future, that –

(A) was not a claim during the proceedings leading to the confirmation of a plan of reorganization;

(B) arises out of the same or similar conduct or events that gave rise to the claims addressed by the injunction issued under paragraph (1); and

(C) pursuant to the plan, is to be paid by a trust described in paragraph (2)(B)(i).

(6) Paragraph (3)(A)(i) does not bar an action taken by or at the direction of an appellate court on appeal of an injunction issued under paragraph (1) or of the order of confirmation that relates to the injunction.

(7) This subsection does not affect the operation of section 1144 [11 USCS § 1141] or the power of the district court to refer a proceeding under section 157 of title 28 or any reference of a proceeding made prior to the date of the enactment of this subsection [enacted Oct. 22, 1994].

(h) Application to existing injunctions. – For purposes of subsection (g) –

(1) subject to paragraph (2), if an injunction of the kind described in subsection (g)(1)(B) was issued before the date of the enactment of this Act, as part of a plan of reorganization confirmed by an order entered before such date, then the injunction shall be considered to meet the requirements of subsection (g)(2)(B) for purposes of subsection (g)(2)(A), and to satisfy subsection (g)(4)(A)(ii), if –

(A) the court determined at the time the plan was confirmed that the plan was fair and equitable in

accordance with the requirements of section 1129(b) [11 USCS § 1129(b)];

(B) as part of the proceedings leading to issuance of such injunction and confirmation of such plan, the court had appointed a legal representative for the purpose of protecting the rights of persons that might subsequently assert demands described in subsection (g)(4)(B) with respect to such plan; and

(C) such legal representative did not object to confirmation of such plan or issuance of such injunction; and

(2) for purposes of paragraph (1), if a trust described in subsection (g)(2)(B)(i) is subject to a court order on the date of the enactment of this Act staying such trust from settling or paying further claims –

(A) the requirements of subsection (g)(2)(B)(ii)(V) shall not apply with respect to such trust until such stay is lifted or dissolved; and

(B) if such trust meets such requirements on the date such stay is lifted or dissolved, such trust shall be considered to have met such requirements continuously from the date of the enactment of this Act.

(i) The willful failure of a creditor to credit payments received under a plan confirmed under this title, unless the order confirming the plan is revoked, the plan is in default, or the creditor has not received payments required to be made under the plan in the manner required by the plan (including crediting the amounts required under the plan), shall constitute a violation of an injunction under subsection (a)(2) if the act of the creditor to collect and

failure to credit payments in the manner required by the plan caused material injury to the debtor.

(j) Subsection (a)(2) does not operate as an injunction against an act by a creditor that is the holder of a secured claim, if –

(1) such creditor retains a security interest in real property that is the principal residence of the debtor;

(2) such act is in the ordinary course of business between the creditor and the debtor; and

(3) such act is limited to seeking or obtaining periodic payments associated with a valid security interest in lieu of pursuit of in rem relief to enforce the lien.

(k) (1) The disclosures required under subsection (c)(2) shall consist of the disclosure statement described in paragraph (3), completed as required in that paragraph, together with the agreement specified in subsection (c), statement, declaration, motion and order described, respectively, in paragraphs (4) through (8), and shall be the only disclosures required in connection with entering into such agreement.

(2) Disclosures made under paragraph (1) shall be made clearly and conspicuously and in writing. The terms "Amount Reaffirmed" and "Annual Percentage Rate" shall be disclosed more conspicuously than other terms, data or information provided in connection with this disclosure, except that the phrases "Before agreeing to reaffirm a debt, review these important disclosures" and "Summary of Reaffirmation Agreement" may be equally conspicuous. Disclosures may be made in a different order and may use terminology different from that set forth in paragraphs (2) through (8), except that the terms "Amount Reaffirmed"

and "Annual Percentage Rate" must be used where indicated.

(3) The disclosure statement required under this paragraph shall consist of the following:

(A) The statement: "Part A: Before agreeing to reaffirm a debt, review these important disclosures:";

(B) Under the heading "Summary of Reaffirmation Agreement", the statement: "This Summary is made pursuant to the requirements of the Bankruptcy Code";

(C) The "Amount Reaffirmed", using that term, which shall be –

(i) the total amount of debt that the debtor agrees to reaffirm by entering into an agreement of the kind specified in subsection (c), and

(ii) the total of any fees and costs accrued as of the date of the disclosure statement, related to such total amount.

(D) In conjunction with the disclosure of the "Amount Reaffirmed", the statements –

(i) "The amount of debt you have agreed to reaffirm"; and

(ii) "Your credit agreement may obligate you to pay additional amounts which may come due after the date of this disclosure. Consult your credit agreement."

(E) The "Annual Percentage Rate", using that term, which shall be disclosed as –

(i) if, at the time the petition is filed, the debt is an extension of credit under an open end credit

plan, as the terms "credit" and "open end credit plan" are defined in section 103 of the Truth in Lending Act [15 USCS § 1602], then –

(I) the annual percentage rate determined under paragraphs (5) and (6) of section 127(b) of the Truth in Lending Act [15 USCS § 1637(b)], as applicable, as disclosed to the debtor in the most recent periodic statement prior to entering into an agreement of the kind specified in subsection (c) or, if no such periodic statement has been given to the debtor during the prior 6 months, the annual percentage rate as it would have been so disclosed at the time the disclosure statement is given to the debtor, or to the extent this annual percentage rate is not readily available or not applicable, then

(II) the simple interest rate applicable to the amount reaffirmed as of the date the disclosure statement is given to the debtor, or if different simple interest rates apply to different balances, the simple interest rate applicable to each such balance, identifying the amount of each such balance included in the amount reaffirmed, or

(III) if the entity making the disclosure elects, to disclose the annual percentage rate under subclause (I) and the simple interest rate under subclause (II); or

(ii) if, at the time the petition is filed, the debt is an extension of credit other than under an open end credit plan, as the terms "credit" and "open end credit plan" are defined in section 103 of the Truth in Lending Act [15 USCS § 1602], then –

(I) the annual percentage rate under section 128(a)(4) of the Truth in Lending Act [15 USCS § 1638(a)(4)], as disclosed to the debtor in the most recent disclosure statement given to the debtor prior to the entering into an agreement of the kind specified in subsection (c) with respect to the debt, or, if no such disclosure statement was given to the debtor, the annual percentage rate as it would have been so disclosed at the time the disclosure statement is given to the debtor, or to the extent this annual percentage rate is not readily available or not applicable, then

(II) the simple interest rate applicable to the amount reaffirmed as of the date the disclosure statement is given to the debtor, or if different simple interest rates apply to different balances, the simple interest rate applicable to each such balance, identifying the amount of such balance included in the amount reaffirmed, or

(III) if the entity making the disclosure elects, to disclose the annual percentage rate under (I) and the simple interest rate under (II).

(F) If the underlying debt transaction was disclosed as a variable rate transaction on the most recent disclosure given under the Truth in Lending Act, by stating "The interest rate on your loan may be a variable interest rate which changes from time to time, so that the annual percentage rate disclosed here may be higher or lower."

(G) If the debt is secured by a security interest which has not been waived in whole or in part or determined to be void by a final order of the court at the time of the disclosure, by disclosing that a security interest or lien

in goods or property is asserted over some or all of the debts the debtor is reaffirming and listing the items and their original purchase price that are subject to the asserted security interest, or if not a purchase-money security interest then listing by items or types and the original amount of the loan.

(H) At the election of the creditor, a statement of the repayment schedule using 1 or a combination of the following –

(i) by making the statement: "Your first payment in the amount of $___ is due on ___ but the future payment amount may be different. Consult your reaffirmation agreement or credit agreement, as applicable.", and stating the amount of the first payment and the due date of that payment in the places provided;

(ii) by making the statement: "Your payment schedule will be:", and describing the repayment schedule with the number, amount, and due dates or period of payments scheduled to repay the debts reaffirmed to the extent then known by the disclosing party; or

(iii) by describing the debtor's repayment obligations with reasonable specificity to the extent then known by the disclosing party.

(I) The following statement: "Note: When this disclosure refers to what a creditor 'may' do, it does not use the word 'may' to give the creditor specific permission. The word 'may' is used to tell you what might occur if the law permits the creditor to take the action. If you have questions about your reaffirming a debt or what the law requires, consult with the attorney who helped you negotiate this agreement reaffirming a debt. If you don't have an

attorney helping you, the judge will explain the effect of your reaffirming a debt when the hearing on the reaffirmation agreement is held.".

(J)

(i) The following additional statements:

"Reaffirming a debt is a serious financial decision. The law requires you to take certain steps to make sure the decision is in your best interest. If these steps are not completed, the reaffirmation agreement is not effective, even though you have signed it.

"1. Read the disclosures in this Part A carefully. Consider the decision to reaffirm carefully. Then, if you want to reaffirm, sign the reaffirmation agreement in Part B (or you may use a separate agreement you and your creditor agree on).

"2. Complete and sign Part D and be sure you can afford to make the payments you are agreeing to make and have received a copy of the disclosure statement and a completed and signed reaffirmation agreement.

"3. If you were represented by an attorney during the negotiation of your reaffirmation agreement, the attorney must have signed the certification in Part C.

"4. If you were not represented by an attorney during the negotiation of your reaffirmation agreement, you must have completed and signed Part E.

"5. The original of this disclosure must be filed with the court by you or your creditor. If a separate reaffirmation agreement (other than the one in Part B) has been signed, it must be attached.

"6. If you were represented by an attorney during the negotiation of your reaffirmation agreement, your reaffirmation agreement becomes effective upon filing with the court unless the reaffirmation is presumed to be an undue hardship as explained in Part D.

"7. If you were not represented by an attorney during the negotiation of your reaffirmation agreement, it will not be effective unless the court approves it. The court will notify you of the hearing on your reaffirmation agreement. You must attend this hearing in bankruptcy court where the judge will review your reaffirmation agreement. The bankruptcy court must approve your reaffirmation agreement as consistent with your best interests, except that no court approval is required if your reaffirmation agreement is for a consumer debt secured by a mortgage, deed of trust, security deed, or other lien on your real property, like your home.

"Your right to rescind (cancel) your reaffirmation agreement. You may rescind (cancel) your reaffirmation agreement at any time before the bankruptcy court enters a discharge order, or before the expiration of the 60-day period that begins on the date your reaffirmation agreement is filed with the court, whichever occurs later. To rescind (cancel) your reaffirmation agreement, you must notify the creditor that your reaffirmation agreement is rescinded (or canceled).

"What are your obligations if you reaffirm the debt? A reaffirmed debt remains your personal legal obligation. It is not discharged in your bankruptcy case. That means that if you default on your reaffirmed debt after your bankruptcy case is over, your creditor may be able to take your property or your wages. Otherwise, your obligations

will be determined by the reaffirmation agreement which may have changed the terms of the original agreement. For example, if you are reaffirming an open end credit agreement, the creditor may be permitted by that agreement or applicable law to change the terms of that agreement in the future under certain conditions.

"Are you required to enter into a reaffirmation agreement by any law? No, you are not required to reaffirm a debt by any law. Only agree to reaffirm a debt if it is in your best interest. Be sure you can afford the payments you agree to make.

"What if your creditor has a security interest or lien? Your bankruptcy discharge does not eliminate any lien on your property. A 'lien' is often referred to as a security interest, deed of trust, mortgage or security deed. Even if you do not reaffirm and your personal liability on the debt is discharged, because of the lien your creditor may still have the right to take the security property if you do not pay the debt or default on it. If the lien is on an item of personal property that is exempt under your State's law or that the trustee has abandoned, you may be able to redeem the item rather than reaffirm the debt. To redeem, you make a single payment to the creditor equal to the current value of the security property, as agreed by the parties or determined by the court."

(ii) In the case of a reaffirmation under subsection (m)(2), numbered paragraph 6 in the disclosures required by clause (i) of this subparagraph shall read as follows:

"6. If you were represented by an attorney during the negotiation of your reaffirmation agreement,

your reaffirmation agreement becomes effective upon filing with the court."

(4) The form of such agreement required under this paragraph shall consist of the following:

"Part B: Reaffirmation Agreement. I (we) agree to reaffirm the debts arising under the credit agreement described below.

"Brief description of credit agreement:

"Description of any changes to the credit agreement made as part of this reaffirmation agreement:

"Signature: Date:

"Borrower:

"Co-borrower, if also reaffirming these debts:

"Accepted by creditor:

"Date of creditor acceptance:".

(5) The declaration shall consist of the following:

(A) The following certification:

"Part C: Certification by Debtor's Attorney (If Any).

"I hereby certify that (1) this agreement represents a fully informed and voluntary agreement by the debtor; (2) this agreement does not impose an undue hardship on the debtor or any dependent of the debtor; and (3) I have fully advised the debtor of the legal effect and consequences of this agreement and any default under this agreement.

"Signature of Debtor's Attorney: Date:".

(B) If a presumption of undue hardship has been established with respect to such agreement, such certification shall state that in the opinion of the attorney, the debtor is able to make the payment.

(C) In the case of a reaffirmation agreement under subsection (m)(2), subparagraph (B) is not applicable.

(6) (A) The statement in support of such agreement, which the debtor shall sign and date prior to filing with the court, shall consist of the following:

"Part D: Debtor's Statement in Support of Reaffirmation Agreement.

"1. I believe this reaffirmation agreement will not impose an undue hardship on my dependents or me. I can afford to make the payments on the reaffirmed debt because my monthly income (take home pay plus any other income received) is $___, and my actual current monthly expenses including monthly payments on post-bankruptcy debt and other reaffirmation agreements total $___, leaving $___ to make the required payments on this reaffirmed debt. I understand that if my income less my monthly expenses does not leave enough to make the payments, this reaffirmation agreement is presumed to be an undue hardship on me and must be reviewed by the court. However, this presumption may be overcome if I explain to the satisfaction of the court how I can afford to make the payments here: ___.

"2. I received a copy of the Reaffirmation Disclosure Statement in Part A and a completed and signed reaffirmation agreement."

(B) Where the debtor is represented by an attorney and is reaffirming a debt owed to a creditor defined in section 19(b)(1)(A)(iv) of the Federal Reserve Act [12 USCS § 461(b)(1)(A)(iv)], the statement of support of the reaffirmation agreement, which the debtor shall sign and date prior to filing with the court, shall consist of the following:

"I believe this reaffirmation agreement is in my financial interest. I can afford to make the payments on the reaffirmed debt. I received a copy of the Reaffirmation Disclosure Statement in Part A and a completed and signed reaffirmation agreement."

(7) The motion that may be used if approval of such agreement by the court is required in order for it to be effective, shall be signed and dated by the movant and shall consist of the following:

"Part E: Motion for Court Approval (To be completed only if the debtor is not represented by an attorney.). I (we), the debtor(s), affirm the following to be true and correct:

"I am not represented by an attorney in connection with this reaffirmation agreement.

"I believe this reaffirmation agreement is in my best interest based on the income and expenses I have disclosed in my Statement in Support of this reaffirmation agreement, and because (provide any additional relevant reasons the court should consider):

"Therefore, I ask the court for an order approving this reaffirmation agreement."

(8) The court order, which may be used to approve such agreement, shall consist of the following:

"Court Order: The court grants the debtor's motion and approves the reaffirmation agreement described above.".

(l) Notwithstanding any other provision of this title the following shall apply:

(1) A creditor may accept payments from a debtor before and after the filing of an agreement of the kind specified in subsection (c) with the court.

(2) A creditor may accept payments from a debtor under such agreement that the creditor believes in good faith to be effective.

(3) The requirements of subsections (c)(2) and (k) shall be satisfied if disclosures required under those subsections are given in good faith.

(m) (1) Until 60 days after an agreement of the kind specified in subsection (c) is filed with the court (or such additional period as the court, after notice and a hearing and for cause, orders before the expiration of such period), it shall be presumed that such agreement is an undue hardship on the debtor if the debtor's monthly income less the debtor's monthly expenses as shown on the debtor's completed and signed statement in support of such agreement required under subsection (k)(6)(A) is less than the scheduled payments on the reaffirmed debt. This presumption shall be reviewed by the court. The presumption may be rebutted in writing by the debtor if the statement includes an explanation that identifies additional sources of funds to make the payments as agreed upon under the terms of such agreement. If the presumption is not

rebutted to the satisfaction of the court, the court may disapprove such agreement. No agreement shall be disapproved without notice and a hearing to the debtor and creditor, and such hearing shall be concluded before the entry of the debtor's discharge.

(2) This subsection does not apply to reaffirmation agreements where the creditor is a credit union, as defined in section 19(b)(1)(A)(iv) of the Federal Reserve Act [12 USCS § 461(b)(1)(A)(iv)].

HISTORY:

(Nov. 6, 1978, P.L. 95-598, Title I, § 101, 92 Stat. 2592; July 10, 1984, P.L. 98-353, Title III, Subtitle A, § 308, Subtitle H, § 455, 98 Stat. 354, 376; Oct. 27, 1986, P.L. 99-554, Title II, Subtitles B, C, §§ 257(o), 282, 283(k), 100 Stat. 3115-3117; Oct. 22, 1994, P.L. 103-394, Title I, §§ 103, 111(a), Title V, § 501(d)(14), 108 Stat. 4108, 4113, 4145.)

(As amended April 20, 2005, P.L. 109-8, Title II, Subtitle A, §§ 202, 203(a), Title XII, § 1210, 119 Stat. 43, 194.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Prior law and revision:

Legislative Statements

Section 524(a) of the House amendment represents a compromise between the House bill and the Senate amendment. Section 524(b) of the House amendment is new, and represents standards clarifying the operation of section 524(a)(3) with respect to community property.

Sections 524(c) and (d) represent a compromise between the House bill and Senate amendment on the issue of reaffirmation of a debt discharged in bankruptcy. Every reaffirmation to be enforceable must be approved by the court, and any debtor may rescind a reaffirmation for 30 days from the time the reaffirmation becomes enforceable [see the 1984 amendment of subset. (c) of this section]. If the debtor is an individual the court must advise the debtor of various effects of reaffirmation at a hearing. In addition, to any extent the debt is a consumer debt that is not secured by real property of the debtor reaffirmation is permitted only if the court approves the reaffirmation agreement, before granting a discharge under section 727, 1141, or 1328, as not imposing a hardship on the debtor or a dependent of the debtor and in the best interest of the debtor; alternatively, the court may approve an agreement entered into in good faith that is in settlement of litigation of a complaint to determine dischargeability or that is entered into in connection with redemption under section 722. The hearing on discharge under section 524(d) will be held whether or not the debtor desires to reaffirm any debts.

Senate Report No. 95-989

Subsection (a) specifies that a discharge in a bankruptcy case voids any judgment to the extent that it is a determination of the personal liability of the debtor with respect to a prepetition debt, and operates as an injunction against the commencement or continuation of an action, the employment of process, or any act, including telephone calls, letters, and personal contacts, to collect, recover, or offset any discharged debt as a personal liability of the debtor, or from property of the debtor, whether or not the debtor has waived discharge of the debt involved. The

injunction is to give complete effect to the discharge and to eliminate any doubt concerning the effect of the discharge as a total prohibition on debt collection efforts. This paragraph has been expanded over a comparable provision in Bankruptcy Act § 14f [section 32(f) of former title 11] to cover any act to collect, such as dunning by telephone or letter, or indirectly through friends, relatives, or employers, harassment, threats of repossession, and the like. The change is consonant with the new policy forbidding binding reaffirmation agreements under proposed 11 U.S.C. 524(b), and is intended to insure that once a debt is discharged, the debtor will not be pressured in any way to repay it. In effect, the discharge extinguishes the debt, and creditors may not attempt to avoid that. The language "whether or not discharge of such debt is waived" is intended to prevent waiver of discharge of a particular debt from defeating the purposes of this section. It is directed at waiver of discharge of a particular debt, not waiver of discharge in toto as permitted under section 727(a)(9).

Subsection (a) also codifies the split discharge for debtors in community property states. If community property was in the estate and community claims were discharged, the discharge is effective against community creditors of the nondebtor spouse as well as of the debtor spouse.

Subsection (b) [subsec. (c) of this section] gives further effect to the discharge. It prohibits reaffirmation agreements after the commencement of the case with respect to any dischargeable debt. The prohibition extends to agreements the consideration for which in whole or in part is based on a dischargeable debt, and it applies whether or not discharge of the debt involved in the agreement has

been waived. Thus, the prohibition on reaffirmation agreements extends to debts that are based on discharged debts. Thus, "second generation" debts, which included all or a part of a discharged debt could not be included in any new agreement for new money. This subsection will not have any effect on reaffirmations of debts discharged under the Bankruptcy Act [former title 11]. It will only apply to discharges granted if commenced under the new title 11 bankruptcy code.

Subsection (c) [subsec. (d) of this section] grants an exception to the anti-reaffirmation provision. It permits reaffirmation in connection with the settlement of a proceeding to determine the dischargeability of the debt being reaffirmed, or in connection with a redemption agreement permitted under section 722. In either case, the reaffirmation agreement must be entered into in good faith and must be approved by the court.

Subsection (d) [subsec. (e) of this section] provides the discharge of the debtor does not affect co-debtors or guarantors.

References in text:

The "Bankruptcy Act", referred to in this section, is Act July 1, 1898, ch 541, 30 Stat. 544, which appeared generally as 11 USCS §§ 1 et seq., was repealed by Act Nov. 6, 1978, P.L. 95-598, Title IV, § 401, 92 Stat. 2682, effective Oct. 1, 1979, as provided by § 402(a) of Act Nov. 6, 1978. Such Act Nov. 6, 1978 also enacted the Bankruptcy Code which generally appears as 11 USCS §§ 101, et seq.

As used in subsec. (h), the "date of the enactment of this Act" probably means the date of enactment of Act Oct. 22, 1994, P.L. 103-394, which enacted subsec. (h).

Effective date of section:

This section became effective on October 1, 1979, pursuant to § 402(a) of Act Nov. 6, 1978, P.L. 95-598, which appears as 11 USCS prec § 101 note.

Amendments:

1984. Act July 10, 1984 (applicable to cases filed 90 days after enactment, as provided by § 552(a) of such Act, which appears as 11 USCS § 101 note), in subsec. (a), in para. (2), substituted "an act" for "any act" and deleted "or from property of the debtor," following "liability of the debtor," and, in para. (3), substituted "an act" for "any act"; in subsec. (c), substituted para. (2) for one which read: "the debtor has not rescinded such agreement within 30 days after such agreement becomes enforceable;", redesignated former para. (3) as para. (5), and added new part (3), redesignated former para. (4) as para. (6) and added new para. (4), and substituted new para. (6) for the redesignated one which read:

"in a case concerning an individual, to the extent that such debt is a consumer debt that is not secured by real property of the debtor, the court approves such agreement as –

"(A)

(i) not imposing an undue hardship on the debtor or a dependent of the debtor; and

"(ii) in the best interest of the debtor; or

"(B)

(i) entered into in good faith; and

"(ii) in settlement of litigation under section 523 of this title, or providing for redemption under section 722 of this title.".

Such Act further, in subsec. (d), in part (2), substituted "subsection (c)(6)" for "subsection (c)(4)"; and added subsec. (f).

1986. Act Oct. 27, 1986 (effective 30 days after enactment on 10/27/86, and applicable as provided by § 302 of such Act, which appears as 28 USCS § 581 note), in subsec. (a), in para. (1), inserted "1228,", and in para. (3), purported to substitute ", 1228(a)(1), or 1328(a)(1)" for "or 1328(c)(1)" however, "1228(a)(1), or 1328(c)(1)" was substituted for "or 1328(c)(1)" for conform to the probable intent of Congress; in subsec (c)(1), inserted "1228,"; in subsec. (d), in the introductory matter, inserted "1228,", substituted "the court may hold" for "the court shall hold", substituted "At any such" for "At such", and inserted "the court shall hold a hearing at which the debtor shall appear in person and", and in para. (2), substituted "section" for "subsection" following "of this".

1994. Act Oct. 22, 1994 (effective on enactment and inapplicable with respect to cases commenced prior to enactment, as provided by § 702 of such Act, which appears as 11 USCS § 101 note), in subsec. (a)(3), substituted "1328(a)(1)" for "1328(c)(1)"; in subsec. (c), in para. (2), designated the existing provision as subpara. (A), in subpara. (A), as so designated, added "and" following "such claim;", and added subpara. (B), in para. (3), in the introductory matter, deleted "such agreement" following "which states that", in subpara. (A), inserted "such agreement", and deleted "and" following "the debtor;", in subpara. (B), inserted "such agreement" and inserted "and" following

"the debtor;", and added subpara. (C), and, in para. (4), substituted "rescission" for "recission"; and in subsec. (d), in the introductory matter, inserted "and was not represented by an attorney during the course of negotiating such agreement", and, in para. (1)(B)(ii) added "and" after the semicolon.

Such Act further (effective and applicable as provided by § 702 of such Act, which appears as 11 USCS § 101 note), added subsecs. (g) and (h).

2005. Act April 20, 2005 (effective 180 days after enactment and inapplicable to cases commenced before the effective date, as provided by § 1501 of such Act, which appears as 11 USCS § 101 note), in subsec. (a)(3), substituted "section 523, 1228(a)(1), or 1328(a)(1), or that" for "section 523 or, 1228(a)(1), or 1328(a)(1) of this title, or that"; in subsec. (c), substituted para. (2) for one which read:

"(2)

(A) such agreement contains a clear and conspicuous statement which advises the debtor that the agreement may be rescinded at any time prior to discharge or within sixty days after such agreement is filed with the court, whichever occurs later, by giving notice of rescission to the holder of such claim; and

"(B) such agreement contains a clear and conspicuous statement which advises the debtor that such agreement is not required under this title, under nonbankruptcy law, or under any agreement not in accordance with the provisions of this subsection;";

and added subsets. (i)-(k).

SUPREME COURT
OF THE STATE OF WASHINGTON

ALAN DeATLEY and DEBRA DeATLEY, husband and wife, Petitioners, vs. LYNN BARNETT and MARLENE BARNETT, husband and wife; LOOKOUT POINT PARTNERS, a Washington partnership, Respondents.	NO. 77442-1 PETITIONER'S MOTION FOR RECONSIDERATION

PETITIONERS DeATLEY hereby move, pursuant to RAP 12.4, that the court reconsider its recent refusal to accept review of the Court of Appeals' decision issued in this case. This motion is based upon the Points and Authorities accompanying the motion and all other portions of the record and authorities set forth in prior briefs which address or support motion issues.

DATED this 24 day of March, 2006.

Respectfully submitted,

LARSON & PERKINS P.L.L.C.
Attorneys for Petitioners

By: /s/ James A. Perkins
James A. Perkins, WSBA #13330

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of March, 2006, I caused to be served by forwarding via Federal Express Priority Overnight service, a true and correct copy of Petitioners' Motion for Reconsideration to:

Margaret Archer
Gordon, Thomas,
Honeywell, et al.
1201 Pacific Avenue, #2200
Tacoma, WA 98401

Annette T. Fitzsimmons
Annette T. Fitzsimmons, P.S.
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Attorneys for Petitioners

SUPREME COURT
OF THE STATE OF WASHINGTON

ALAN DeATLEY and DEBRA DeATLEY, husband and wife, Petitioners, vs. LYNN BARNETT and MARLENE BARNETT, husband and wife; LOOK-OUT POINT PARTNERS, a Washington partnership, Respondents.	NO. 77442-1 MEMORANDUM OF POINTS AND AUTHORITIES SUPPORTING PETITIONER'S MOTION FOR RECONSIDERATION

Petitioners and appellants, Alan DeAtley and Debra DeAtley, husband and wife, (DeAtley) request the court to reconsider its refusal to accept appellants petition for review filed March 8, 2006.

ISSUES PRESENTED FOR RECONSIDERATION.

1. Do federal bankruptcy laws require that a contract transferred more than one year before the DeAtley's bankruptcy to their wholly owned non-debtor corporation be separately disclosed on the DeAtley's personal bankruptcy schedules.

2. Does respondent Barnett proven conduct create a sufficient fact dispute about judicial estoppel applicability so that the Court of Appeals decision must be reversed and/or review accepted?

Relevant Record Facts.

On or about January 1, 1988, DeAtley and Barnett executed a contract agreement (DeAtley Agreement) (CP 802-808). The DeAtley Agreement provided that if Barnett later transferred a contract interest which he had in real property to any future party, DeAtley would have a first refusal right to purchase the assigned interest (CP 806).

In January 1990, DeAtley assigned their interest in the DeAtley Agreement to their wholly owned company, Wild Ones, Inc. d/b/a AD3 Company (AD3 Company) (CP 298-361). Approximately two years later in March 1992, the DeAtley's filed for bankruptcy (CP 298-361). On their bankruptcy schedules, the DeAtley's correctly disclosed they owned all AD3 Company's stock. Later, particulars about this company's debts and assets were also disclosed by the DeAtley's amended schedules (CP 326, 347-348). Because two bankruptcy creditors placed at issue AD3 Company's finances, DeAtley's bankruptcy lawyer confirmed that she specifically discussed the DeAtley Agreement first refusal rights and AD3 Company obligations under the DeAtley Agreement with the bankruptcy trustee (CP 198-200). It is undisputed that because of the two creditor's inquiries, the trustee conducted an investigation into AD3 Company's assets, and eventually concluded that AD3 Company's known assets and debts were "evenly matched." Accordingly, by later pleading filed September 22, 1992, the trustee subsequently abandoned all stock in AD3 Company back to the DeAtleys (CP 407).

It is undisputed that during the bankruptcy DeAtley never knew DeAtley Agreement first refusal rights were exercisable, or that Barnett had breached the parties' contract by not informing DeAtley that in 1991 the purchase

contract for the property had been assigned by Barnett to a newly formed partnership (CP 862-883).

Not until approximately 1995, several years after DeAtley's personal bankruptcy had been concluded, did DeAtley first learn that DeAtley Agreement first refusal rights had matured and/or lawsuit claims might exist (CP 1224-1227).

Although DeAtley did not own the DeAtley Agreement during the bankruptcy, post-bankruptcy when AD3 Company dissolved, the ownership of its remaining assets, including the DeAtley Agreement, returned to DeAtley (CP 303).

At no point during the bankruptcy and at no point post-bankruptcy did DeAtley ever claim the DeAtley Agreement had terminated or that Barnetts or AD3's contract rights as against each other were in any way effected by DeAtley's bankruptcy.

To subsequently support their request for lawsuit dismissal, the respondents have argued the DeAtley's, on their personal bankruptcy schedules had to identify not just their ownership of AD3 Company stock, but all assets AD3 Company now owned, including the DeAtley Agreement, and further had to disclose that as part of the DeAtley Agreement there were first refusal rights that might have value.

In fact, the respondent's entire judicial estoppel argument is based upon the assertion that federal law required this information to be put on DeAtley's personal bankruptcy schedules and that because federal law was allegedly breached by DeAtley's failure to do so, judicial estoppel applies.

It necessarily follows however, that if the respondents are wrong about what federal law required DeAtley to do, then judicial estoppel does not apply, this court should accept review, and the Court of Appeals ruling that summary judgment properly issued should be reversed.

A. Do Lawsuit Claims or Contract Rights Belonging to a Non-Debtor Corporation or Partnership Need to be Listed as Assets on a Debtor's Personal Bankruptcy Schedules?

If the answer to this question is no, then reconsideration should now issue and this court should accept case review.

The answer to this question under federal law is unequivocally no. The federal bankruptcy court in the case *In re Russell*, 121 B.R. 16 (Bankr. W.D.Ark. 1990) confirmed that corporations have a separate legal existence from shareholders and that accordingly, while a trustee may have an equitable interest in the assets represented by the corporation's stock, the assets themselves are not part of the property of the estate and a trustee has no right to possess directly the underlying assets. This same conclusion was reached by the 7th Circuit in the case *Fowler v. Shadel*, 400 F.3d 1016 (7th Cir. Wis. 2005). In that case, the court held that while the interest held by a debtor in a partnership or corporation would be the property of the estate, the underlying assets of the partnership or corporation are not part of the property over which the trustee has control. (*See also In re People's Bankshares Ltd.*, 68 B.R. 536, 539 (Bankr.N.D. Iowa 1986)). The federal district court in Washington has also upheld that causes of action including shareholder derivative suits are the intangible assets of a corporation, and are not the

property of an individual shareholder. (*See Turner v. Officers. Directors and Employees of Mid Valley Bank*, 712 F. Supp. 1489, 1497 (E.D. Wash. 1988)).

As further federal authority for this proposition, DeAtley would also cite the court to *In re Walker*, 198 B.R. 476 (Bankr. E.D.Va. 1996). In that case, the debtor, Robert Walker, was part owner of a partnership known as the "Walker Partnership." Mr. Walker filed a Chapter 11 bankruptcy petition, and proposed and had a plan confirmed.

Post-confirmation, the Walker Partnership, filed suit against a creditor lender, NationsBank, seeking $10 million in damages for the partnership under a lender liability claim. This suit wasn't filed until three years after the underlying bankruptcy plan had been approved and the bankruptcy file closed.

As in this case, the defendant bank subsequently asked that the state suit be dismissed upon a number of grounds, including judicial estoppel. Addressing this issue, the court said:

> Much of NationsBank argument focused on the fact that the cause of action was not disclosed by the debtor. The failure of the debtor to disclose the potential cause of action in his bankruptcy schedules, disclosure statement or plan of reorganization does not carry dispositive weight under the facts of this particular case.

Walker at 479.

The court noted:

> A debtor cannot be expected to unerringly predict the future, but rather must provide information

> on all factors known to him at the time that bear upon the success *or* failure of the proposals set forth in the plan. *In re Ligon*, 50 B.R.127, 130 (Bankr.M.D.Tenn. 1985). [Citation omitted]. *The facts before the Court are that the cause of action was not the debtor's, rather it was that of the Walker Partnership. The debtor was to have been a guarantor on the proposed loan and was a general partner of the Walker Partnership, but that still does not make it his cause of action to assert.*
>
> The debtor's interest in the partnership was fully disclosed in the schedules and plan of reorganization and we hold that the debtor was under no duty in the case *sub judice* to disclose this potential cause of action against NationsBank. [Emphasis added.]

In decision footnote 7, the court further said:

> *The plan discloses thirteen related entities of the debtor. The plan confirmation process would be hopelessly complicated were the debtor required to disclose evert detail about related entities. This would have the potential to lead to situations where a case would turn into a "global" bankruptcy dealing with every entity of the debtor. In our view. this is not what the disclosure requirements of the Bankruptcy Code contemplate.* [Emphasis added.]

Walker at 480.

Almost identical facts are presented by this case. Here, under federal law AD3 Company, not DeAtley, owned the DeAtley Agreement. To the extent any potential lawsuit claim might exist, AD3 Company, not DeAtley, owned that claim. At the time of the DeAtley bankruptcy, the record proves that DeAtley had no notice the contract's

first refusal rights had matured, making the contract a valuable corporate asset. As noted above however, the fact AD3 Company owned the contract option was nevertheless fully disclosed to the trustee. The DeAtleys, no more than the trustee, had the "crystal ball" ability to know that several years in the future, information would be discovered to support that contract option rights had matured. Given these proven facts, to now suggest that federal bankruptcy law required DeAtley to "unerringly predict the future" by stating on schedules that a contract right owned by his non-debtor company might someday ripen into an asset or a lawsuit claim, is to put it mildly, unreasonable, and as the *Walker* court noted, inconsistent with the disclosure obligations imposed by federal law. Yet the Superior Court, Court of Appeals, and now as a practical matter, this court, have all affirmatively imposed this obligation upon DeAtley as a consequence of the case orders which have been entered.

Factually, even less justification for applying judicial estoppel exists in this case than existed in *Walker.* Here, both prior to and during the bankruptcy, it is proven that DeAtley had no knowledge any lawsuit claims or potential lawsuit claims existed or that first refusal right had matured. In contrast, Robert Walker admitted he knew of the facts supporting the underlying NationsBank lawsuit prior to his bankruptcy, because they took place in 1989 and 1990.

That claims or assets belonging to non-debtor companies are not "property of the debtor" and accordingly are not part of the estate for scheduling purposes is a well-settled rule under federal law.

For example, the bankruptcy court in the case *In re Magnani*, 223 B.R. 177 (1997) addressing this specific issue in the context of a discharge denial proceeding specifically upheld:

> While a debtor may be denied a discharge under § 727(a)(4) for a failure to schedule his interest in a separate business entity, failure to schedule property belonging to another entity is generally not grounds for denial of discharge.
>
> Bank alleges in ¶ 9(a) of the complaint that Magnani made a false oath by omitting information from his statement of financial affairs. *The alleged omissions were not material to Magnani's case because they involve assets and transactions of the partnership, a non-debtor entity. Magnani disclosed his interest in the partnership on his schedule B in answer to question 13. Magnani is entitled to summary judgment on Bank's claim under § 727(a)(4).* [Emphasis added.]

Magnani, id at 184.

Similarly, in the case *In re Beeber*, 239 B.R. 13 (1999), the court said:

> However, Plaintiffs fail to meet their burden of proving, as required by § 727(a)(2), that the Debtor "transferred, removed, destroyed, mutilated or concealed – (A) *property of the debtor* . . . or, (B) *property of the estate.* 11 U.S.C. § 727(a)(2). [Emphasis added]. The Plaintiffs' claim that the Debtor's conveyance of his stock interest and goodwill of RBPC to himself constituted a misappropriation of RBPC's assets. However, a misappropriation of RBPC property was a not a misappropriation or transfer by the Debtor of his own property. *An examination of caselaw finds*

> *that § 727(a)(2) requires that the property in question be property of the Debtor or property of the estate, not merely assets of a corporation where the Debtor is a shareholder of that corporation.* [Emphasis added].

Beeber at 26.

Addressing this same issue, Tenth Circuit Court of Appeals has held:

> *The words: "Property of the debtor," are not the same as "property in which the debtor has a derivative interest." To the contrary, the language of the statute is sufficiently circumscriptive to eliminate such an interpretation.* MBank contends the Bankruptcy Code defines "property" to include equitable interests of the debtor, 11 U.S.C. § 541(a)(l). Hence, the creditor maintains the transfer of an asset of a corporation is the transfer of property in which a stockholder has an equitable interest to which § 727(a)(2)(A) would extend. We disagree.
>
> *The purpose of § 541(a)(1) is to define "property of the estate." If MBank's theory is correct, the estate of a debtor who holds a share in a corporation would not only include the value that share would bring, but also a liquidatable interest in any asset owned by that corporation. That is not the scope of § 541(a)(1).*
>
> *Congress intended to limit the reach of § 727(a)(2)(A) only to those transfers of property in which the debtor has a direct proprietary interest. MBank's argument to the contrary is creative, indeed ingenious, but it is not persuasive, and the district and bankruptcy courts correctly so concluded.* [Emphasis added.]

In Thurman, 901 F.2d 839 (C.A. 10 (Okl.) 1990); *See also, BPS Guard Services, Inc. v. Woodhead*, 172 B.R. 628, 633 (Bankr.D.Neb. 1994); *Riumbau v. Colodner, (In re Colodner)* 147 B.R. 90, 93 (Bankr.S.D.N.Y. 1992); *CIT Group/ Factoring Manufacturers Hanover, Inc. v. Srour,* 138 B.R.413 (Bankr.S.D.N.Y. 1992); *In re Wong*, 291 B.R. 266 (Bankr. S.D.N.Y. 2003).

As these federal cases make dispositively clear, assets belonging to a debtor's non-bankruptcy partnerships or corporations are not under federal law the "property of the debtor" and since only property of the debtor must be listed on schedules under 11 U.S.C. § 541(a), there are simply no grounds for the Court of Appeals or for this court to now conclude that the DeAtley Agreement or any contingent lawsuit claim which might arise from the DeAtley Agreement had to be listed by the DeAtleys on schedules in their bankruptcy. Absent a requirement to disclose or list such information on schedules, there simply are no facts or law that would now support a judicial estoppel bar.

Further, the admitted disclosure of the DeAtley Agreement's existence and right of first refusal to the bankruptcy trustee specifically prevents judicial estoppel from being an issue.

A case particularly on point is the recent case *In re Bargar,* 279 B.R. 900 (Bkrtcy.N.D.Ga. 2002). In that case, a debtor admittedly had a personal lawsuit claim which she had filed against her employer, and which admittedly was not disclosed on her later filed bankruptcy schedules. At her subsequently scheduled 341(a) creditor meeting however, claim existence was specifically brought to the Chapter 7 trustee's attention.

Notwithstanding her verbal disclosure, the trustee subsequently issued a no distribution report, confirming there were no assets which could be recovered for the creditors' benefit. As in this case, although debtors' counsel and the debtors both recalled disclosing this information to the trustee and so testified, by the time of the hearing, the transcript of the 341 meeting had been lost and the trustee did not appear at the motion hearing to provide any added information about what had occurred.

After discovering this scheduling omission, the defendant moved to dismiss the state case upon the grounds of judicial estoppel. Analyzing this issue, the federal court had no difficulty in confirming that judicial estoppel did not apply. The court stated:

> Debtor in the instant case voluntarily disclosed the claim to the Chapter 7 trustee who is responsible for pursuing it on behalf of creditors in the estate. There was no concealment. Debtor was not "caught" after being challenged.
>
> . . .
>
> *In any event, although debtor did not amend her schedules to list the litigation as a matter of technical bankruptcy pleading, her voluntary disclosure of it to the Chapter 7 trustee at the section 341 meeting had the same substantive effect of an amendment from the standpoint of the Chapter 7 trustee's knowledge and duties.* The claim was (and is) property of the estate under 11 U.S.C. § 541, and the trustee had authority to pursue it under Fed. R. Bankr. P. 6009. Ultimately, it is the trustee's duty to investigate the lawsuit as property of the estate – its merits, it posture, and its value to the estate. Debtor's amendment of her

> schedules would not have changed the trustee's knowledge of the claim or his duties.
>
> . . .
>
> Debtor had litigation counsel and bankruptcy counsel who were advising her as to her rights and duties. Had her counsel prepared an amendment to her schedules for her, she would presumably have signed it and it would have been filed, as the Federal Rules of Bankruptcy Procedure authorize. [Citation]. Because counsel did not prepare an amendment admittedly because of oversight, she justifiably could have concluded that she had no further obligations. It would patently unfair to attribute counsel's error to debtor in these circumstances. Her counsel's failure to amend the schedules does not render debtor's conduct offensive and, in the circumstances of this ease, was nothing more than inadvertence on counsel's part. Clearly, neither debtor nor debtor's counsel acted with an intentional or manipulative disregard of the legal system. . . . [Emphasis added.]

Bargar at 906-907.

Here, as in *Bargar,* the record facts are not disputed. The Chapter 7 trustee was told of the DeAtley contract and first refusal rights. The trustee later provably investigated the company's debts and assets, an investigation that went far beyond just the DeAtley Agreement, before concluding that in his judgment and to his knowledge, the company's debts and assets were "evenly matched" so that AD3 Company stock had no value. Here, as in *Bargar,* given the trustee's conduct following disclosure, it is impossible to conclude that any amendment to DeAtleys' bankruptcy disclosure pleadings would have made any

difference to the administration of the case. Accordingly, the appellate court's dismissal of DeAtleys' claim as a consequence of alleged judicial estoppel was in error.

Indeed, the principal difference between *Bargar* and the present case is that in *Bargar,* the lawsuit claim was admittedly owned personally by they debtor and was by definition, "property of the estate," while in this case, by definition, the contract and potential lawsuit claim at issue *weren't property of the estate* for which any disclosure duty was imposed. (See preceding section).

Unfortunately, as noted in DeAtleys' initial filed petition, these federal bankruptcy law issues were not addressed by the superior court or Court of Appeals in its decision, yet they are central to the proper determination of DeAtleys' lawsuit rights. It follows that this court must accept review so that federal law is now fairly considered and properly applied. As a matter of justice, the DeAtleys deserve no less.

B. Judicial Estoppel Doesn't Apply If Claims Weren't Listed Because They Were Unknown.

Federal law has long upheld that judicial estoppel doesn't apply to prevent later prosecution of lawsuit claims if the facts show the debtor had no knowledge the claims existed during the bankruptcy. For example, in *Burnes v. Pemco Aeroplex, Inc.,* 291 F.3d 1282 (11th Cir. Ala. 2002), the court said:

> The Fifth Circuit concluded that, "the debtor's failure to satisfy its statutory disclosure duty is 'inadvertent' [only] when, in general, the debtor either lacks knowledge of the undisclosed claims or has no motive for their concealment.

Burnes at 1287; *see also, In re Coastal Plains, Inc.*, 179 F.3d 197 (5th Cir. Tex. 1999); *Browning v. Levy*, 283 F.3d 761 (6th Cir. Ohio 2002); *U.S. v. Hussein*, 178 F.3d 125, 130 (2nd Cir. N.Y. 1999); *King v. Herbert J. Thomas Memorial Hosp.*, 159 F.3d 192, 196-97 (4th Cir. W.Va. 1998); *Helfand v. Gerson*, 105 F.3d 530, 536 (9th Cir. Hawaii 1997); *Matter of Cassidy*, 892 F.2d 637, 642 (7th Cir. Ill. 1990).

Here, the record facts establish that DeAtley had no knowledge the DeAtley Agreement option had any value as an asset or that lawsuit claims existed, because Barnett illegally kept from them, from the bankruptcy court, and from the bankruptcy trustee, the fact contract rights had matured. *These proven facts are dispositive in this case.*

Specifically, in every judicial estoppel case, state or federal, which petitioners have found, all have one thing in common. Based on the record presented, the court was able to conclude the debtors knew they had something of value which they tried to hide.

In this case, the record facts prove exactly the opposite. Here, DeAtley had no knowledge the DeAtley Agreement option had any value, because Barnett hid from them he had breached the contract, and that contract first refusal rights had matured. The facts in this case actually show DeAtley had no reason to hide the contract, because to the best of their knowledge it had no value and quite likely would never have value. The record facts further prove the DeAtleys didn't hide the contract option or its existence from the bankruptcy court or the trustee. Rather, DeAtley's bankruptcy lawyer has confirmed by her declaration this information was disclosed. (*See*, CP 198-200; 364-366; CP 198-200).

Where record facts prove that to the best of the debtors' and trustee's knowledge, the asset in question had no value, not one case throughout the country has ever held that judicial estoppel applies. Nevertheless, neither the Superior Court nor Court of Appeals has ever explained why, contrary to applicable law, the authorities mentioned above should be disregarded in order to apply judicial estoppel against the DeAtleys here.

Further, bankruptcy courts have specifically held that judicial estoppel is not applicable where the debtor's lack of knowledge about claim rights is directly attributable to the complaining party's own non-disclosures:

> The defendants argue that Neptune is precluded from pursuing recovery causes of action against them because Neptune's disclosure statement makes a clear, affirmative statement that there were no claims worth attempting to recover and that it elected to forego collection of potential preferences or fraudulent transfers because there were no meaningful avenues of recovery for it or its creditors.
>
> . . .
>
> *In the instant case, Neptune maintains that the defendants concealed and altered documents which prevented Neptune from learning about potential recoveries under their agency agreement until after confirmation of its Chapter 11 plan. Neptune argues that it could not reveal in its disclosure statement that it possessed potential causes of action against Neptune. because the documents and facts supporting its adversary proceeding were concealed by the defendants.* Accordingly, Neptune contends that a defendant's acts to conceal these facts prevented it from

> learning about its potential recovery claims until after it filed an objection to the defendant's proof of claim on October 6, 1987.
>
> . . .
>
> *Neptune's contentions with respect to being mislead and prevented from disclosing potential recovery actions in its disclosure statement raise substantial questions of fact with respect to the application of the doctrine of judicial or equitable estoppel which cannot be decided under a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1) and (6) as adopted by bankruptcy rule 7012(b).* This is so because the doctrine of estoppel, either judicial or equitable, "has never been applied where the party's assertions were based on fraud, inadvertence or mistake . . . *In re Cory,* 892 F.2d 829, 836 (9th Cir. 1989) (quoting *Konstantinidis v. Chin,* 626 F.2d 933, 939 (D.C. Cir. 1980) and *Johnson Service Co. v. Transamerica Ins. Co.,* 485 F.2d 164, 175 (5th Cir. 1973)). [Emphasis added.]

In re Neptune Worldwide Moving, Inc., 111 B.R. 457 (Bkrtcy. S.D.N.Y. 1990).

Those are precisely the facts on record before the court here. Barnett, not DeAtley, is the proven wrongdoer in this case. On November 14, 2003, the Superior Court issued an order finding that Barnett had breached the DeAtley agreement when he transferred his contract interest to a new partnership in 1991 and did not tell DeAtley. (CP 189-190). Barnett admittedly kept these contract breach facts from DeAtley, the bankruptcy court and bankruptcy trustee, as a consequence of which DeAtley had no knowledge that claims against Barnett might exist, or that contract option rights had matured.

Given these proven record facts, what federal or state law now supports that Barnett, the at-fault party, should have his liability extinguished, while the DeAtleys, whom the proven record shows are innocent, should be punished by now having the lawsuit's claims dismissed?

Petitioner's counsel has spent hours searching for even one bankruptcy case throughout the entire United States which holds that a specific contract or a specific lawsuit claim held by a debtor's non-bankrupt corporation must be listed on bankruptcy schedules or is considered to be the property of the debtor's estate as opposed to the property of the non-bankrupt corporation. Not one such case has been found, and not one such case has been cited by the Superior Court, by the Court of Appeals, or by the respondents.

A similar search has been made with respect to whether any bankruptcy case in the entire United States says that judicial estoppel exists or can be applied when the complaining creditor has provably failed to disclose facts that would have put the debtor, the bankruptcy court and/or bankruptcy trustee on notice that a lawsuit claim or valuable contract right might exist. Again, not one case has been found, and not one case previously cited disputes the federal law which supports DeAtley's position as set forth.

The logical reason no such cases exist is that if facts show the debtor or trustee believed an asset was valueless, there simply is no evidence to prove a debtor was playing "fast and loose" with the court about a claim or asset, and at most all that can be said was that the debtor and/or trustee were "inadvertently mistaken" about the need to

more fully discuss the particular claim or asset in the bankruptcy.

CONCLUSION

This is a substantial case involving hundreds of thousands of dollars. The central issues are governed by federal law and federal bankruptcy law, a technical area not commonly before the superior court or Court of Appeals. It is in precisely this type of case where an error of law by the Superior Court and/or Court of Appeals is most likely to occur.

If as part of any prior briefing or as part of the Court of Appeals' decision, any on-point federal law had been cited which specifically said that property belonging to a non-debtor corporation was for some reason "property of the estate" so that its listing on schedules was required, DeAtleys could understand why review might be denied. Similarly, if any federal case law had been cited which said the failure to list a contract or lawsuit claim belonging to a debtor's non-bankrupt partnership or corporation had to be disclosed or judicial estoppel applied, DeAtleys could accept that grounds existed for denying review. *There are no such cases however.* There is instead abundant federal law to the contrary, dispositive law which it does not appear has been fairly or reasonably considered.

Particularly disturbing, the record facts prove DeAtleys did nothing wrong in their bankruptcy. They disclosed the DeAtley Agreement and first refusal right to the trustee. They identified their ownership of AD3 Company and all of its assets in their schedules. There is no evidence they sought to hide anything, much less the DeAtley Agreement or its contingent option, and there is

no evidence that anyone, much less DeAtley, knew until three years after bankruptcy completion that because of Barnett's contract breach, contract first refusal rights had any value. It is simply absurd to suggest that DeAtleys were ever playing "fast and loose" with the court over a contingent contract right considered valueless by all bankruptcy parties who examined it.

Particularly galling, the DeAtley contract was considered valueless for bankruptcy purposes, precisely because of Barnett's proven illegal contract breach failure to disclose. It is Barnett, not DeAtley, who is the proven "bad actor" in this case. It is acknowledged Barnett hid from DeAtley the contract was breached. Barnett also hid from the bankruptcy court and bankruptcy trustee, that first refusal rights had matured. It's Barnett who has been shown to have violated his contractual disclosure duties in this case, not DeAtley. Since judicial estoppel is an equitable doctrine, why, given Barnett's proven contract breach failure to disclose, is it equitable to now hold him harmless, but punish the innocent party, who as a direct consequence of Barnett's bad acts, didn't know there were any added relevant bankruptcy facts to disclose.

DeAtley challenges the respondents, and similarly beseeches this court to now identify any federal case law precedent that has ruled differently on the issues now presented than the federal case law which petitioners cite. If, as DeAtley's believe, none can be found (and to date none have been), DeAtleys would respectfully request this court to give this case a "fresh" look. Upon doing so, the DeAtleys in good faith believe this court will correctly conclude dispositive federal law does support DeAtley's lawsuit and appeal position, warranting acceptance of review.

DATED this 24th day of March, 2006.

Respectfully submitted,

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Attorneys for Petitioners

/s/ James A. Perkins
James A. Perkins, WSBA #13330

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of March, 2006, I caused to be served by forwarding via Federal Express Priority Overnight service, a true and correct copy of Memorandum of Points and Authorities Supporting Petitioners' Motion for Reconsideration to:

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C-23

No. 22780-4-III
No. 22977-7-III

THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

ALAN DeATLEY and DEBRA DeATLEY,
husband and wife,

Petitioners,

v.

LYNN BARNETT and MARLENE BARNETT,
husband and wife;
LOOKOUT POINT PARTNERS, a partnership,

Respondents.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER/APPELLANTS.

Alan DeAtley & Debra DeAtley (DeAtley) ask this court to accept review of the Division III, Court of Appeals decision captioned *Alan DeAtley and Debra DeAtley. husband and wife v. Lynn Barnett and Marlene Barnett, husband and wife, and Lookout Point Partners, a partnership,*

(collectively Barnett), Court of Appeals Cause No. 22780-4-III, consolidated with Court of Appeals Cause No. 22977-7-III, filed February 20, 2004.

B. COURT OF APPEALS DECISION.

A copy of the decision is in the Appendix at pages A-1 to A-9. A copy of the order Denying Petitioner's Motion for Reconsideration is in the Appendix at page B-1.

C. ISSUES PRESENTED FOR REVIEW.

1. Did the Appeals Court err by failing to accept as true all record facts most favorable to DeAtley.

2. Did the Court of Appeals err in ruling that DeAtley failed to comply with the requirements of 11 U.S.C.A. § 521(1) (App. C-1), and Fed.R.Bankr.P. 1007 when filing their bankruptcy schedules.

3. Did the Appeals Court err by not correctly applying federal and state judicial estoppel case law to those facts most favorable to DeAtley.

D. CASE STATEMENT.

On January 29, 1986, Lynn and Marlene Barnett contracted to purchase approximately 500 acres between the Naches River and Selah, Washington. (CP 951-959). After contracting, on February 11, 1986, a written partnership agreement was signed by Barnett with third parties John and June Cotton (Barnett/Cotton Partnership). (CP 1423-1431). Under this partnership, Cotton made a $60,000 capital contribution and Barnett agreed to contribute the contract right to purchase the property. (CP

1423-1431). Notwithstanding agreement terms, during the partnership's existence the contract was never assigned to the Barnett/Cotton Partnership. (CP 778).

In 1987 Barnett first spoke to DeAtley about a proposed 86-acre transfer in return for DeAtley constructing a utilities trench and road at the property. (CP 772). Eventually, on January 1, 1988, DeAtley and Barnett executed a contract (DeAtley Agreement). (CP 802-808). At no time prior to DeAtley Agreement execution did Barnett disclose the Barnett/Cotton Partnership existed and the DeAtley Agreement does not mention this partnership. (CP 774-777, 802-808).

The DeAtley Agreement said any later contract assignment by Barnett would trigger a DeAtley first refusal right to purchase the assigned property. (CP 806).

After signing, DeAtley promptly performed part of the work called for by the DeAtley Agreement. (CP 780-781). Subsequently, Cotton became ill and told Barnett he wanted to sell his interest in their partnership. (CP 782-783). Unknown to DeAtley, on or about February 28, 1991, Barnett offered to buy back Cotton's partnership interest. (CP 820). Cotton agreed and the repurchase terms were confirmed in writing. (CP 823). Barnett subsequently paid Cotton $210,000 for his partnership interest and released Cotton from any obligation to further pay on the purchase contract. (CP 820, 822). Consistent with this buy-out, a final tax return was prepared to evidence the Barnett/Cotton Partnership's termination. (CP 825-833). After this partnership terminated, in July 1991 Barnett formed a *new partnership* with third parties George Lagerquist, et al. (Barnett/Lagerquist Partnership). (CP 862-883). Concurrent with forming this new partnership, Barnett

assigned their contract rights to this second partnership. (CP 791, 792). DeAtley however was not told his first refusal rights had matured and could be exercised. (CP 791, 792). Although all of DeAtley's contract work was originally to be done no later than January 1991 (CP 803-804) prior to this date Barnett told DeAtley not to do the remaining work. (CP 421-425; 785; 794; 795; 799-800). He did so because Barnett intended to petition Selah to annex the property and until the Selah annexation was concluded, he couldn't tell DeAtley how the final contract work was to be done. DeAtley agreed to delay final contract work until Barnett had the necessary information and instructed him to proceed. (CP 1173-1174; 798-800; 902-903; 1173-1181; 1232-1240; 1242-1246).

While waiting for Barnett's instructions, in January 1990 DeAtley assigned their interest in the DeAtley Agreement to their wholly-owned Washington company, Wild Ones, Inc. d/b/a AD3 Company (AD3). (CP 298-361). DeAtley intended to use AD3 as the development entity for the 86 acres. (CP 298-361). Consistent with this contract assignment, a quit claim deed for the 86 acres was given to AD3 by DeAtley and recorded October 10, 1991. (CP 298-361).

After these transfers occurred, in March 1992 DeAtley's personally filed for bankruptcy in New Mexico (where Alan DeAtley was then living). (CP 298-361). Because both the 86 acres and the DeAtley Agreement were owned by AD3 when DeAtley filed bankruptcy, neither the property nor the DeAtley Agreement were specifically listed as personal assets on DeAtley's bankruptcy schedules. (CP 321-352). Instead, DeAtley's personal schedules simply disclosed they owned all AD3

Company stock and that their corporation now owned the previously transferred 86 acres, etc. (CP 326-347; 348).

Since Barnett had never released DeAtley personally from DeAtley Agreement construction obligations, DeAtley's personal schedules accurately said DeAtley owed an estimated $50,000 unfulfilled debt to Barnett. (CP 336). Pre-bankruptcy, Barnett admittedly knew the DeAtley/Barnett contract had been assigned to AD3. (CP 414-417). Barnett also does not deny later receiving all bankruptcy notices sent to creditors. (CP 518-519).

As part of their bankruptcy filing, DeAtley disclosed to their bankruptcy lawyer, Jennifer Behles (Behles), the Barnett/DeAtley contract existed and had been assigned to AD3, along with the 86 acres. (CP 198-200; 364-366). Consistent with this disclosure. Behles *told the bankruptcy trustee* about the transferred Barnett/DeAtley contract and also discussed its first refusal rights with the trustee. (CP 198-200). Because Barnett never told anyone DeAtley's first refusal rights had matured however, no one knew the contract's rights were exercisable and thereby had value. (CP 364-365). Since no one knew option rights were exercisable, the trustee eventually concluded all of AD3's known assets and debts were "evenly matched" and so by specific motion and later bankruptcy court order, the trustee abandoned all AD3 stock back to DeAtley. (CP 407).

Despite being notified. Barnett paid no attention to DeAtley's personal bankruptcy. (CP 518-519). In particular, Barnett never considered Barnett/DeAtley contract obligations to have been discharged by DeAtley's personal bankruptcy. This is proven by a later *May 25, 1995* letter sent by Barnett offering to "release DeAtley from further

road building obligations." (CP 1226). Also, after DeAtley's complaint was filed, Barnett alleged that DeAtley *was still liable* for damages for allegedly breaching Barnett/DeAtley contract terms. (CP 1277).

Not until 1995 did DeAtley first learn Barnett's purchase contract interest had been assigned. After learning these facts, on May 2, 1997, DeAtley commenced this litigation. (CP 1460-1462). Shortly afterward DeAtley filed a partial summary judgment motion. (CP 1373-1403). In response an amended answer was filed and again DeAtley's prior bankruptcy was not mentioned. (CP 1274-1278). Instead, respondents falsely claimed the second Barnett/Lagerquist partnership was not a "new partnership" and that accordingly, Barnett's contract assignment did not cause the contract's first refusal rights to mature.

After DeAtley later proved the Barnett/Cotton Partnership had been dissolved and that accordingly respondent's claims were false, on November 14, 2003 the superior court issued a partial summary judgment in DeAtley's favor, finding Barnett had breached the DeAtley Agreement. Subsequently, barely a month before trial, respondents moved to dismiss DeAtley's complaint upon the grounds their personal bankruptcy now defeated DeAtley's claims. (CP 526-527). On November 13, 2003, the court granted respondent's motion (CP 213-215) and this appeal followed.

Despite the fact DeAtley appealed from a motion to dismiss, requiring the court to accept as true, only those facts most favorable to DeAtley, Division III denied DeAtley' s appeal. As a basis for denial the court held that because DeAtley did not specifically list on their personal bankruptcy schedules the Barnett/DeAtley contract. "We

reason they lost their right to claim benefits under the right of first refusal." (*See* App. A-5). The court also based its decision upon its erroneous understanding of Washington judicial estoppel law. (*See* App. A-5 to A-6).

Although DeAtley filed a motion for reconsideration, DeAtley's motion for reconsideration was denied. (*See* App. B-1).

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED.

The Court of Appeals' decision should be reviewed because there are issues of substantial public interest that should be determined by the Supreme Court and because the Court of Appeals' decision provably conflicts with Washington law as set forth by other Washington Appeal's courts and this court. (RAP 13.4(b)).

1. The Appellate Court Erred by Refusing to Accept as True All Evidence Most Favorable to DeAtley.

When considering a motion to dismiss, Washington law requires the court to accept as true all facts and to interpret all evidence, in a manner most favorable to the non-moving party. *Johnson v. Associated Sand & Gravel Co.*, 71 Wn.2d 738, 740, 430 P.2d 944 (1967) (*citing Baxter v. Greyhound Corp.*, 65 Wn.2d 421, 397 P.2d 857 (1964)); *Lindberg v. Steele*, 5 Wn.2d 54, 55-6, 104 P.2d 940 (1940); *Phennah v. Whalen*, 28 Wn. App. 19, 22, 621 P.2d 1304 (1980).

> "*No element of discretion is involved.* A motion to dismiss can only be granted when it can

> be held as a matter of law that there is *no evidence* or reasonable inference therefrom to sustain a verdict for the opposing party." [Emphasis added]. *Miller v. Payless Drug Stores of Wash., Inc.*, 61 Wn.2d 651, 379 P.2d 932 (1963) (*citing Lambert v. Smith*, 54 Wn.2d 348, 340 P.2d 774 (1959); *Williams v. Hofer*, 30 Wn.2d 253, 256-57, 191 P.2d 306 (1948).

Consistent with these settled legal rules, the following facts apply. In 1990 DeAtley assigned their interest in the Barnett/DeAtley contract to AD3. (CP 298-305, 311). In 1991, pre-bankruptcy DeAtley deeded their interest in the contract transferred 86 acres to AD3. (CP 298-305, 318-320). In exchange, AD3 assumed the contract obligation to complete all remaining contract work whenever Barnett so instructed. (CP 298-305). Pre-bankruptcy Barnett knew the parties' contract had been assigned to AD3 (CP 414-417), yet respondents elected not to participate actively in the bankruptcy. (CP 518-519).

Critically, attorney Behles knew the Barnett/DeAtley contract had been assigned pre-bankruptcy to AD3. (CP 198-200, 364-366). The bankruptcy trustee also knew about the transferred Barnett/DeAtley contract as well as its first refusal rights. (CP 198-200). Although these two bankruptcy experts (Behles and the trustee) both knew these facts, DeAtley were not required to amend their bankruptcy schedules, supporting the conclusion the schedules were properly filed as required by federal law.

During the bankruptcy, no one knew DeAtley Agreement first refusal rights were exercisable. Due solely to Barnett's breach, the trustee instead concluded AD3's known assets and debts were "evenly matched," and so by

specific motion and by confirming court order the trustee abandoned all AD3 stock back to DeAtley. (CP 407).

Since contract rights are freely assignable under Washington law unless forbidden by statute or public policy (*Old Nat. Bank of Washington v. Arneson,* 54 Wn. App. 717, 776 P.2d 145, *review denied,* 113 Wn.2d 1019, 781 P.2d 1321 (1989); *International Commercial Collectors, Inc. v. Mazel Co., Inc.,* 48 Wn. App. 712, 716-17, 740 P.2d 363 (1987)) and because the DeAtley/Barnett contract does not preclude assignment, DeAtley's pre-bankruptcy assignment to AD3 was lawful. Since AD3 owned the contract pre-bankruptcy and because AD3 was not in bankruptcy, DeAtley were not required to separately list the DeAtley/Barnett contract on their bankruptcy schedules. Similarly, because the contract belonged to AD3, at no time did DeAtley ever claim the contract's rights or obligations (now held by AD3) had been extinguished by their personal bankruptcy.

Post-bankruptcy in 1996, AD3 was administratively dissolved. (CP 303). At that point the corporation's assets and obligations, including the DeAtley Agreement, once more became DeAtley's personal property, subject to existing creditors' claims. *Zimmerman v. Kyte,* 53 Wn. App. 11, 17, 765 P.2d 905 (1988); RCW 23B.14.050(1)(d) (App. C-2); *Ban-Mac. Inc. v. King County,* 69 Wn 2d 49. 416 P.2d 694 (1966). After the contract was returned, DeAtley was entitled by law as AD3's successor to sue Barnett for contract breach. Accordingly, complaint dismissal should not have occurred.

2. The Appellate Court's Conclusion About Federal Bankruptcy Schedule Requirements is Wrong.

In its decision, the court says DeAtley were required to disclose all assets, including potential causes of action, in their bankruptcy schedules, citing as support 11 U.S.C.A. § 521(1) and Fed.R.Bankr.P. 1007. (App. A-4).

Contrary to the court's statement however, 11 U.S.C.A. § 521(1) does not require listing a potential cause of action belonging to a *non-debtor company.* Similarly, Fed.R.Bankr.P. 1007 does not say potential causes of action by a non-debtor company must be listed on a debtor's personal schedules. Bankruptcy courts have instead long held a debtor's property includes only those contract rights held by the debtor at the time of bankruptcy filing (*In re Resource Technology Corp.,* 254 B.R. 215 (Bankr.N.D. Ill. 2000). This has been the consistent holding of bankruptcy courts for quite awhile. (Ownership of stock in a corporation does not mean the corporation is property of the estate.) *In re Peoples Bankshares, Ltd.,* 68 B.R. 536, 539 (Bankr.N.D.Iowa 1986) (where corporate property was transferred and the debtor was a shareholder of the corporation, debtor had no interest in the property transferred, and no 11 U.S.C.A. § 548(a) (App. C-3) claim exists as a matter of law.) *See In re Miner,* 185 B.R. 362, 367 (Bankr.N.D.Fla. 1995) *aff'd* by *Miner v. Bay Bank & Trust Co.,* 83 F.3d 436 (11th Cir. (Fla.) 1996).

As the bankruptcy court noted in *In re Russell,* 121 B.R. 16 (Bankr. W.D.Ark. 1990):

> The trustee's argument that the estate has an equitable interest in the funds solely by virtue of an 82% stock ownership is also without merit. *A*

> *corporation has a separate legal existence from its shareholders, and the corporation, not its shareholders, owns the corporate assets and owes the corporate debts.* [Citations] . . . Consequently, assets of a corporation are not distributable as part of an individual shareholder's estate until all creditor claims are paid. [Citations] *Therefore, the funds in question do not constitute property of the estate, and the trustee is without authority to retain possession of the funds for the benefit of creditors of the estate.* [Emphasis added].

Indeed, the 7th Circuit in 2005, in the case of *Fowler v. Shadel,* 400 F.3d 1016 (7th Cir. (Wis.) 2005), addressed this very question.

> *The corporate assets of Fowler Trucking, Inc. are not property of the debtor and therefore cannot become property of Fowler's bankruptcy estate.* Hence, the question of an exemption does not arise. *See Collier on Bankruptcy,* § 101.30[3], p. 101-96 (5th Ed. Rev.) Stating that while the individual's interest in the partnership or corporation (which could be 100 percent) would be property of the estate, *the assets of the partnership or corporation would not be. See also Ginsberg & Martin on Bankruptcy,* § 5.01[B], stating that the interest in question [an interest included in the estate] must be the debtor's property. For example, if the debtor owns shares in a corporation, the shares become part of the estate; *the assets of the corporation do not.* [Emphasis added.] [Emphasis added].

Fowler at 1019. *See also, In re Murray,* 147 B.R. 688, 690 (Bankr.E.D.Va. 1992); *In re Cassis,* 220 B.R. 979 (Bankr.M.D.Iowa 1998); *In re Peoples Bankshares, Ltd.,* 68 B.R. 536, 539 (Bankr.N.D. Iowa, 1986) ("Although a debtor

owns 100 percent of the stock of a corporation, the property interest of the debtor's bankruptcy estate extends only to the intangible property rights represented by the stock certificates . . . ").

Washington law is also clear on the ownership of corporate assets. For example, the court in *State of California v. Tax Commission of State,* 55 Wn.2d 155, 157, 346 P.2d 1006 (1959), held that:

> A corporation is, by legislative enactment, an entity. It is such, separate and distinct from the persons who own its stock. This statutory entity, so long as it exists, is the owner of all property which the corporation possesses. An *individual shareholder has no property interest in its physical corporate assets.* The persons who are shareholders have only rights of participation in the management of the corporate affairs. [Emphasis added].

Washington's federal district courts have also held "[c]auses of action, including shareholder derivative suits, *are intangible assets of a corporation* . . . " [Emphasis added]. *Turner v. Officers, Directors and Employees of Mid Valley Bank,* 712 F. Supp. 1489, 1497 (1988) (*citing Lewis v. Chiles,* 719 F.2d 1044, 1047 (9th Cir. 1983)). These decisions prove the Court of Appeals was wrong. Federal law did not require the DeAtley Agreement to be listed on DeAtley's personal bankruptcy schedules. DeAtley's Petition for Review should accordingly be accepted.

3. The Appeals Court Decision Conflicts With Both Federal and State Law.

A contract assignee has all rights of the assignor, including the right to independently prosecute or defend any claims or causes of action. *Estate of Jordan by Jordan v. Hartford Acc. and Indem. Co.,* 120 Wn.2d 490, 844 P.2d 403 (1993), *recons. denied*; *Washington State Dept. of Revenue v. Security Pacific Bank of Washington N.A.,* 109 Wn. App. 795, 38 P.3d 354 (2002). Property validly assigned prior to any bankruptcy preference period is not part of the debtor's estate. *In re Swartwout,* 123 B.R. 794 (Bankr.S.D. Ohio 1991); *Estate of Lellock v. Prudential Ins. Co. of America,* 811 F.2d 186 (3rd Cir.(Pa.) 1987). In contrast to these authorities, not one statute or case is cited which requires individual debtors to list on personal schedules, anything more than stock ownership in a non-debtor company and the debtor's belief as to its value, both of which appeared in DeAtley's schedules. Accordingly, before the Appeals Court through its published opinion now imposes a substantive obligation upon all debtors in this state which no federal courts and no other state courts impose, this issue should be considered by the Supreme Court, and this Petition for Review should be accepted.

4. The Court Did Not Correctly Apply State or Federal Judicial Estoppel Case Law.

The Fifth Circuit in *In re Coastal Plains, Inc.,* 179 F.3d 197 (5th Cir. (Tex.) 1999), the Sixth Circuit in the case *Browning v. Levy,* 283 F.3d 761 (6th Cir. (Ohio) 2002), the Second Circuit in *U.S. v. Hussein,* 178 F.3d 125, 130 (2nd Cir. (N.Y.) 1999), the Fourth Circuit in *King v. Herbert J. Thomas Memorial Hosp.,* 159 F.3d 192, 196-97 (4th Cir. (W.Va.) 1998), and the Ninth Circuit in *Helfand v. Gerson,*

105 F.3d 530, 536 (9th Cir. (Hawaii) 1997) have all held the application of judicial estoppel *is inappropriate* in cases where a debtor's conduct amounts to nothing more than "mistake or inadvertence."

Both the Fifth Circuit in *In re Coastal Plains, supra,* and the Sixth Circuit in *Browning v. Levy, supra,* have identified two circumstances in which a debtor's failure to disclose a cause of action in a bankruptcy action will be deemed, *as a matter of law,* "inadvertent."

> One is where the debtor lacks knowledge of the factual basis of the undisclosed claims, and the other is where the debtor has no motive for concealment.

In re Coastal Plains at 210; *Browning v. Levy* at 776.

Critically because DeAtley are appealing from a motion to dismiss, this court must determine whether accepting all facts favoring DeAtley are true, judicial estoppel applies.

Applying this two-part test, the record first shows no one involved in DeAtley's bankruptcy knew any lawsuit claims against Barnett existed, because Barnet's breach wasn't discovered until years after the bankruptcy. (CP 364-365; 1406). Since no one, including DeAtley, had knowledge first refusal rights had value, the record secondly proves DeAtley had "no motive to conceal" that contingent claims against Barnett might exist. Since these "true" record facts satisfy the two federal court tests, as a *matter of law* judicial estoppel does not apply and the Court of Appeals erred in holding it did apply.

Washington law too precludes judicial estoppel when only "mistake or inadvertence" is evidenced by the record

(*State, Dept. of Revenue v. Martin Air Conditioning and Fuel Co., Inc.*, 35 Wn. App. 678, 668 P.2d 1286 (1983)), yet dispositively, nowhere in the appellate court's decision is this controlling law mentioned. Instead, ignoring controlling law, the Appellate Court based its decision upon distinguishable cases. *Linklater v. Johnson,* 53 Wn. App. 567, 768 P.2d 1020 (1989) for example says only that rights of "action in which the debtor had an interest" become property of the estate under 11 U.S.C.A. § 541. Here, because the DeAtley Agreement belonged to AD3, DeAtley no longer owned any contract claims, so they were not by definition "property of the estate." Similarly, in *Marks v. Benson,* 62 Wn. App. 178, 813 P.2d 180 (1991) the court ruled debtors lacked the standing to bring an action, solely because the "obligation on which it was based" was not disclosed nor administered in the Chapter 7 bankruptcy. The Court of Appeals cites to *Benson,* because not having carefully read the record, the court says DeAtley "did not list their allegedly mature right of first refusal as an asset." (App. A-5). The court ignores that nobody knew a first refusal right had matured. How can parties list something they don't know? The court next ignores the assigned DeAtley Agreement "on which the later claim is based" *was disclosed and administered* by the trustee as part of the Chapter 7 bankruptcy. (CP 198-200). Indeed, the record confirms the trustee actively investigated AD3's assets and debts for the specific purpose of determining stock value. (CP 199, 362-367). The Court of Appeals further ignores that consistent with 11 U.S.C.A. § 554(a) (App. C-4) the trustee did take action to abandon AD3's stock when a motion for that purpose was specifically filed. (CP 407).

Under federal law, upon specific abandonment, all property so abandoned "ceases to be property of the estate and reverts to the debtor." *In re Keller,* 229 B.R. 900 (Bankr.S.D. Ohio 1998); *In re DeVore,* 223 B.R. 193 (9th Cir.BAP 1998); *In re Sills,* 126 B.R. 974, 976 (Bankr.S.D. Ohio 1991). This issued abandonment order is in complete contrast to the facts in *Marks supra,* where no specific abandonment order was filed. In short, the Court of Appeals relied upon *Marks* because it had the record facts wrong.

Equally troubling is the appellate court citation to the recent case *Cunningham v. Reliable Concrete Pumping, Inc.,* 108 P.3d 147 (2005). In that case the debtor, prior to filing a bankruptcy petition, was already suing on a personal injury claim which he owned. He did not disclose this known personal lawsuit claim on his schedules. These case facts are not remotely similar to this case's facts. Here DeAtley had no personal claims against anyone. Because of the assignmentm, AD3 owned them. Similarly, on the date bankruptcy was filed, no lawsuit was pending and no one knew a contract breach had even occurred. In short, citation to the *Cunningham* decision simply underscores the Court of Appeals did not focus on the record facts *most favorable* to DeAtley when analyzing the judicial estoppel issue.

5. The Court of Appeals Erred in Not Applying The Most Favorable Facts to Washington Judicial Estoppel Law.

The appellate court also cites to six non-exclusive factors which Washington courts consider when applying judicial estoppel. (App. A-5). Its decision is silent however,

as to how any of the six factors are supported by records facts.

Taking each factor in turn, under Washington law, "to give rise to an estoppel the parties' positions must not merely be different, but so inconsistent that one necessarily excludes the other. (*See Markley v. Markley,* 31 Wn.2d 605, 615, 198 P.2d 486 (1948); *Raymond v. Ingram,* 47 Wn. App. 781, 737 P.2d 314 (1987). Here both before and after bankruptcy DeAtley maintained the Barnett contract belonged to AD3. For this reason, DeAtley have never claimed in any proceeding the contract was discharged by their bankruptcy. Since it is consistently only the non-discharged AD3 rights which DeAtley later sued to enforce, DeAtley's lawsuit is not "inconsistent" with DeAtley's bankruptcy proceedings.

To support judicial estoppel a "judgment" must also have been rendered in the first action. Here, no judgment on the underlying contract was ever entered by the bankruptcy court.

To support judicial estoppel the parties in question before the court must be the same. Here they are not. AD3 was a non-bankrupt party. AD3's contract ownership and enforcement rights were never before the bankruptcy court for adjudication.

Finally, record facts must prove the party claiming estoppel (Barnett) was not mislead and never changed position as a consequence of DeAtley's bankruptcy. Here, the record proves he was not and did not. There is accordingly nothing "unjust" about allowing DeAtley to enforce *AD3's contract rights* against Barnett. Although not one of the six tests is met, the appellate court wrongly says

judicial estoppel applies. The Petition for Review should be accepted.

F. CONCLUSION.

The appellate court erred in concluding federal law required DeAtley to put something more in their schedules. DeAtley accurately disclosed their stock ownership in AD3. That's all federal law required and all the bankruptcy experts upon whom DeAtley relied (Behles and the trustee) required. *See, In re Resource Technology Corp., supra*; *In re Peoples Bankshares, Ltd., supra* at 539; *In re Miner, supra* at 367; *In re Russell, supra*; *Fowler, supra* at 1019; *In re Murray, supra* at 690; and *In re Cassis,* 220 B.R. 979 (Bankr.M.D.Iowa 1998).

Because AD3 separately owned the DeAtley Agreement, DeAtley's bankruptcy had no impact on contract validity or upon AD3's later rights as a non-bankruptcy party to pursue its contract claims.

Even if it could be shown that federal law required AD3's claims to be further disclosed on DeAtley's personal schedules, any failure to disclose was due either to a "mistake" or "inadvertence." Because the record supports at minimum this is true, the Court of Appeals provably erred by ignoring these facts, and accordingly its judicial estoppel holding *is in direct conflict with existing federal and state law decisions,* mandating review by this court. The appeals court also erred by saying the record showed the trustee did not know about the DeAtley Agreement (he did), and by ignoring the specific abandonment motion and order which issued in this case. Finally, the court erred by refusing to recognize the legal separateness of DeAtley from AD3.

Obviously, it is a matter of "substantial public interest" that Washington State residents know what information is and is not required to be listed on bankruptcy schedules in order to preserve possible lawsuit claims. The current published Court of Appeals decision answers that question *differently than every other federal court and every other state court* which has considered the issue. It follows that this review petition should be accepted.

RESPECTFULLY SUBMITTED this 19th day of July, 2005.

LARSON & PERKINS P.L.L.C.

By: /s/ James A. Perkins
James A. Perkins, WSBA #13330
Attorneys for Petitioners

[Opinion of the Court of Appeals of the State of Washington omitted here, but reproduced at pages A-1.]

COURT OF APPEALS, STATE OF WASHINGTON,
DIVISION III

ALAN DeATLEY and DEBRA DeATLEY, husband and wife, Appellants, v. LYNN BARNETT, MARLENE BARNETT, and LOOKOUT POINT PARTNERS, Respondents.	)))))))))))	No. 22780-4-III cons.w/ No. 22977-7-III ORDER DENYING MOTION FOR RECONSIDERATION

(Filed Jun. 23, 2005)

THE COURT has considered appellants' motion for reconsideration of this Court's opinion under date of May 17, 2005, and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED, appellants' motion for reconsideration is hereby denied.

DATED: June 23, 2005

FOR THE COURT:

/s/ Kenneth H. Kato
KENNETH H. KATO
CHIEF JUDGE

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11 U.S.C.A. § 521

United States Code Annotated Currentness
Title 11. Bankruptcy (Refs & Annos)
Chapter 5. Creditors, The Debtor, and the Estate (Refs & Annos)
Subchapter II. Debtor's Duties and Benefits

§ 521. Debtor's duties

The debtor shall –

(1) file a list of creditors, and unless the court orders otherwise, a schedule of assets and liabilities, a schedule of current income and current expenditures, and a statement of the debtor's financial affairs;

(2) if an individual debtor's schedule of assets and liabilities includes consumer debts which are secured by property of the estate –

(A) within thirty days after the date of the filing of a petition under chapter 7 of this title or on or before the date of the meeting of creditors, whichever is earlier, or within such additional time as the court, for cause, within such period fixes, the debtor shall file with the clerk a statement of his intention with respect to the retention or surrender of such property and, if applicable, specifying that such property is claimed as exempt, that the debtor intends to redeem such property, or that the debtor intends to reaffirm debts secured by such property;

(B) within forty-five days after the filing of a notice of intent under this section, or within such additional time as the court, for cause, within such forty-five day period fixes, the debtor shall perform his intention with respect to such property, as specified by subparagraph (A) of this paragraph; and

(C) nothing in subparagraphs (A) and (B) of this paragraph shall alter the debtor's or the trustee's rights with regard to such property under this title;

(3) if a trustee is serving in the case, cooperate with the trustee as necessary to enable the trustee to perform the trustee's duties under this title;

(4) if a trustee is serving in the case, surrender to the trustee all property of the estate and any recorded information, including books, documents, records, and papers, relating to property of the estate, whether or not immunity is granted under *section 344* of this title; and

(5) appear at the hearing required under *section 524(d)* of this title.

CREDIT(S)

(*Pub.L. 95-598*, Nov. 6, 1978, 92 Stat. 2586; *Pub.L. 98-353, Title III, §§ 305*, 452, July 10, 1984, 98 Stat. 352, 375; *Pub.L. 99-554, Title II, § 283(h)*, Oct. 27, 1986, 100 Stat. 3117.)

DESIGNATION OF SUBSECTION (A); ENACTMENT OF SUBSECTION (B)

<*Pub.L. 109-8, Title I, § 106(d), Title XV, § 1501*, Apr. 20, 2005, 119 Stat. 38, 216, provided that, except as otherwise provided, effective 180 days after April 20, 2005, and inapplicable with respect to cases commenced under Title 11 before the effective date, this section is amended by inserting "(a)" before "The debtor shall – ", and by adding at the end a new subsection (b) to read as follows:>

<**(b)** In addition to the requirements under subsection (a), a debtor who is an individual shall file with the court – >

<(1) a certificate from the approved nonprofit budget and credit counseling agency that provided the debtor services under section 109(h) describing the services provided to the debtor; and>

<(2) a copy of the debt repayment plan, if any, developed under section 109(h) through the approved nonprofit budget and credit counseling agency referred to in paragraph (1).>

RCW 23B.14.050
Effect of dissolution.

(1) A dissolved corporation continues its corporate existence but may not carry on any business except that appropriate to wind up and liquidate its business and affairs, including:

(a) Collecting its assets;

(b) Disposing of its properties that will not be distributed in kind to its shareholders;

(c) Discharging or making provision for discharging its liabilities;

(d) Distributing its remaining property among its shareholders according to their interests; and

(e) Doing every other act necessary to wind up and liquidate its business and affairs.

(2) Dissolution of a corporation does not:

(a) Transfer title to the corporation's property;

(b) Prevent transfer of its shares or securities, although the authorization to dissolve may provide for closing the corporation's share transfer records;

(c) Subject its directors or officers to standards of conduct different from those prescribed in chapter *23B.08* RCW;

(d) Change quorum or voting requirements for its board of directors or shareholders; change provisions for selection, resignation, or removal of its directors or officers or both; or change provisions for amending its bylaws;

(e) Prevent commencement of a proceeding by or against the corporation in its corporate name;

(f) Abate or suspend a proceeding pending by or against the corporation on the effective date of dissolution; or

(g) Terminate the authority of the registered agent of the corporation.

[1989 c 165 § 158.]

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11 U.S.C.A. § 548

United States Code Annotated Currentness
Title 11. Bankruptcy (Refs & Annos)
Chapter 5. Creditors, The Debtor, and the Estate (Refs & Annos)
Subchapter III. The Estate (Refs & Annos)

§ 548. Fraudulent transfers and obligations

(a)(1) The trustee may avoid any transfer (including any transfer to or for the benefit of an insider under an employment contract) of an interest of the debtor in property,

or any obligation (including any obligation to or for the benefit of an insider under an employment contract) incurred by the debtor, that was made or incurred on or within 2 years before the date of the filing of the petition, if the debtor voluntarily or involuntarily –

(A) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted; or

(B)(i) received less than a reasonably equivalent value in exchange for such transfer or obligation; and

(ii)(I) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;

(II) was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital;

(III) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured; or

(IV) made such transfer to or for the benefit of an insider, or incurred such obligation to or for the benefit of an insider, under an employment contract and not in the ordinary course of business.

(2) A transfer of a charitable contribution to a qualified religious or charitable entity or organization shall not be considered to be a transfer covered under paragraph (1)(B) in any case in which. –

(A) the amount of that contribution does not exceed 15 percent of the gross annual income of the debtor for the year in which the transfer of the contribution is made; or

(B) the contribution made by a debtor exceeded the percentage amount of gross annual income specified in subparagraph (A), if the transfer was consistent with the practices of the debtor in making charitable contributions.

(b) The trustee of a partnership debtor may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within 2 years before the date of the filing of the petition, to a general partner in the debtor, if the debtor was insolvent on the date such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation.

(c) Except to the extent that a transfer or obligation voidable under this section is voidable under *section 544*, *545*, or *547* of this title, a transferee or obligee of such a transfer or obligation that takes for value and in good faith has a lien on or may retain any interest transferred or may enforce any obligation incurred, as the case may be, to the extent that such transferee or obligee gave value to the debtor in exchange for such transfer or obligation.

(d)(1) For the purposes of this section, a transfer is made when such transfer is so perfected that a bona fide purchaser from the debtor against whom applicable law permits such transfer to be perfected cannot acquire an interest in the property transferred that is superior to the interest in such property of the transferee, but if such transfer is not so perfected before the commencement of

the case, such transfer is made immediately before the date of the filing of the petition.

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11 U.S.C.A. § 554

United States Code Annotated Currentness
Title 11. Bankruptcy (Refs & Annos)
Chapter 5. Creditors, The Debtor, and the Estate (Refs & Annos)
Subchapter III. The Estate (Refs & Annos)

§ 554. Abandonment of property of the estate

(a) After notice and a hearing, the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate.

(b) On request of a party in interest and after notice and a hearing, the court may order the trustee to abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate.

(c) Unless the court orders otherwise, any property scheduled under *section 521(1)* of this title not otherwise administered at the time of the closing of a case is abandoned to the debtor and administered for purposes of *section 350* of this title.

(d) Unless the court orders otherwise, property of the estate that is not abandoned under this section and that is not administered in the case remains property of the estate.

CREDIT(S)

(*Pub.L. 95-598*, Nov. 6, 1978, 92 Stat. 2603; *Pub.L. 98-353, Title III, § 468*, July 10, 1984, 98 Stat. 380; *Pub.L. 99-554, Title II, § 283(p)*, Oct. 27, 1986, 100 Stat. 3118.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1978 Acts. Under this section the court may authorize the trustee to abandon any property of the estate that is burdensome to the estate or that is of inconsequential value to the estate. Abandonment may be to any party with a possessory interest in the property abandoned. In order to aid administration of the case, subsection (b) deems the court to have authorized abandonment of any property that is scheduled under section 521(1) and that is not administered before the case is closed. That property is deemed abandoned to the debtor. Subsection (c) specifies that if property is neither abandoned nor administered it remains property of the estate. *Senate Report No. 95-989.*

1984 Acts. Statements by Legislative Leaders, see 1984 U.S.Code Cong. and Adm.News, p. 576.

1986 Acts. *House Report No. 99-764* and *House Conference Report No. 99-958*, see 1986 U.S.Code Cong. and Adm.News, p. 5227.

Legislative Statements

Section 554(b) is new and permits a party in interest to request the court to order the trustee to abandon property of the estate that is burdensome to the estate or that is of inconsequential value to the estate.

Amendments

1986 Amendments. Subsec. (c). *Pub.L. 99-554* substituted "521(1)" for "521(a)(1)".

CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of July, 2005, I caused to be served by forwarding via Federal Express Standard Overnight service, a true and correct copy of Petition for Review to:

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